

Libya: The Legality of the Intervention

An analysis of the basis, measures and effects adopted and deployed by the UN Security Council through resolutions 1970 and 1973.

Candidate number: 541

Submission deadline: 25.11.2012

Number of words: 17 591



Table of contents

ABBREVIATIONS AND ACRONYMS.....	1
1 INTRODUCTION	2
1.1 Background and aim of this thesis.....	2
1.2 Methods	4
1.2.1 Principles of treaty Interpretation.....	5
1.2.2 Principles of interpreting Security Council resolutions	7
1.3 The relationship between legality and judicial review	10
2 THE MAIN PRINCIPLES OF NON-INTERVENTION	11
2.1 State sovereignty.....	11
2.2 General exceptions	13
2.3 R2P (Responsibility to protect) - a third exception?	14
3 LEGAL BASIS FOR RESOLUTIONS 1970 AND 1973.....	16
3.1 UN Charter Article 39	16
3.1.1 "Peace"	17
3.1.2 "Threat"	17
3.1.3 "International"	19
3.1.4 Partial conclusions	20
3.2 Subsequent Security Council practice	21
3.2.1 Iraq	22
3.2.2 Yugoslavia.....	25
3.2.3 Somalia.....	27

3.2.4	Rwanda.....	29
3.2.5	Haiti.....	30
3.2.6	Partial conclusions	32
3.3	Applying Article 39 to the conflict.....	34
3.4	Final conclusions to Chapter Three	37
4	THE LEGALITY OF THE MILITARY OPERATIONS	38
4.1	Moving from jus ad bellum to jus in bello	38
4.2	Interpreting the mandate	40
4.2.1	What are "all necessary measures"?	40
4.2.2	What are "necessary" measures?	41
4.2.3	Who are "civilians"?	41
4.2.4	Geographical limitations?	42
4.2.5	What is a "threat of attack"?	43
4.2.6	Can ground forces be used?	44
4.2.7	Can arms be sent to the rebels?	45
4.2.8	Targeting Colonel Mu'hammar al-Gaddafi personally?	46
4.3	General principles of international humanitarian law	48
4.4	Applying the limits of the mandate and the rules of IHL	50
4.4.1	Aiding rebel forces to facilitate regime change?	50
4.4.2	The targeting of Colonel Mu'hammar al-Gaddafi	53
4.4.3	Indiscriminate or disproportionate use of force?	55
4.5	Final conclusions to Chapter Four	59
5	ENDING REMARKS.....	60
	BIBLIOGRAPHY	62

Abbreviations and acronyms

Al-Gaddafi forces	Military and security forces loyal to Colonel Mu'hammar al-Gaddafi
BRICS	Russia, China, India, Brazil and South Africa
ECHR	European Court of Human Rights
GA	General Assembly
GCIV	Fourth Geneva Convention
HRW	Human Rights Watch
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
MIF	Multinational Interim Force
NATO	North Atlantic Treaty Organisation
OIC	Organization of the Islamic Conference
OUP	Operation Unified Protector
R2P	Responsibility to Protect
SC	Security Council
SCR	Security Council Resolution
SSDF	Somali Salvation Democratic Front
Thuwwar	Opposition fighters, literally means "revolutionaries"
UN	United Nations
USC	United Somali Congress
VLCT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background and aim of this thesis

The conflict in Libya between the opposition and regime supporters led to thousands of lives being lost.¹ One of the roots to the humanitarian crisis was planted in Benghazi on 17 February 2006. Cartoons portraying the prophet Mohammed were fuelling protests all over the Arab world. The Benghazi protest ended when security forces killed at least 12 people and injured scores of others. Five years after Benghazi a new wave of anti-government protests were powered by similar outrage in Tunisia and Egypt. After years of government oppression, the rage of the civilian population in Libya cumulated into a protest now directly aimed at Colonel Mu'ammar al-Gaddafi's regime. The new protest named the "Day of rage" was held on the five year anniversary of the previous one held in Benghazi.

This peaceful protest was met by security forces using excessive and lethal force, causing numerous civilians to die while attempting to exercise their basic human rights. A snowball effect had begun which led to further and larger clashes throughout Libya. Between opposing sides stood innocent bystanders falling into the category of collateral damage by the thousands as the conflict intensified. Al-Gaddafi forces would target civilians and residential areas specifically with intent to kill, using mortar attacks and indiscriminate weapons such as cluster bombs and mines in their efforts to control the population. Extrajudicial executions of captives were not uncommon either throughout the conflict.

On the other side, opposition fighters named the Thuwwar would also kidnap and torture those suspected of supporting the regime. At least a dozen were confirmed killed this way. It is therefore safe to say that unlawful acts were happening on both sides of the growing conflict.

¹ These and following facts were obtained through Amnesty International's (2011) report which is based on their fact-finding visits to Libya between 26 February and 28 May 2011.

The OIC² and the Peace and Security Council of the African Union³ initially responded by both condemning the use of excessive force against civilians, respectively 22 and 23 February 2011. The League of Arab States later called on the SC to impose a no-fly zone over Libya to prevent further loss of civilian lives.⁴ These responses came from states and organizations tied closest to Libya both territorially and politically, and gave the international community grounds for concern.

Following the Arab League's recommendation the SC adopted resolution 1970 on 26 February 2011.⁵ It imposed an arms embargo, travel ban, asset freeze and referred the matter to the ICC. Most of these non-military measures soon proved inadequate and were shortly after expanded to the use of "all necessary measures" by resolution 1973 on 17 March 2011.⁶ Preventing attacks on the civilian population was the main purpose behind its adoption. A precondition for such authorization is a legal matter since certain conditions found in Chapter VII of the UN Charter must be met before such powers are made available. The powers to both decide when these conditions are met and authorize adequate action belongs solely to the SC.

The on-going conflict in Libya clearly amounted to a humanitarian disaster with a wide range of negative consequences towards both active and non-active participants to the conflict. A question remaining in the aftermath concerns the legality of the authorization. Did these consequences suffice to regard the Chapter VII conditions as met? The relevance of such a question is high if one views the conflict in Libya as a purely internal matter, considering the Charter's main purpose is to secure international peace.⁷

² OIC General Secretariat (2011)

³ Communique of the 261st meeting, para. 2.

⁴ Al Jazeera (2011)

⁵ S/RES/1970, 26 February 2011.

⁶ S/RES/1973, 17 March 2011.

⁷ UN Charter Art. 1(1)

Secondly, a question of coalition forces staying within their mandate must also be discussed when taking into account that others have viewed these actions as going beyond the authorization, and thus being unlawful.⁸ Examining these two principal questions is the main goal of this thesis.

Before moving on to these questions, the framework of which these questions will be answered in must first be outlined. Historical complexity and blameworthiness naturally fall outside this scope. Facts will be gathered from notable human rights organisations and presumed correct for this purpose. Since international law provides many a tool and alternative ways of interpretation, precision and context is of high importance. Defining the methods used will be the first step to ensure one understands the specific context of which these questions will be answered.

1.2 Methods

To be able to answer questions of legality, interpreting and applying the correct rule of law is essential. The scope of the law for these questions is found by interpreting the UN Charter, relevant SCR's and international humanitarian law (IHL). However, since the Charter and SCR's differ from ordinary treaties in both creation and content, they warrant a further discussion towards the applicability of ordinary interpretational rules. The customary rules of treaty interpretation codified through the Vienna Convention⁹ are those usually applied to ordinary treaties, hence the question to answer is whether or not the principles also apply to these instruments due to their unique character.

⁸ Ulfstein G, Christiansen Hege E. *The Legality of the NATO bombings in Libya*. Forthcoming

⁹ VCLT Articles 31-33

1.2.1 Principles of treaty Interpretation

The UN Charter was mainly formulated by politicians and its wording has a broad and general approach.¹⁰ What really sets the Charter apart from ordinary treaties is its constitutive element. It is similar to a state's constitution with regards to build up and complexity, but packaged in the form of a treaty and is said to contain elements of both a *traité-contrat* and *traité-loi*.¹¹

One cannot hide the fact that the Charter represents an unprecedented agreement with huge consequences if it were to be wrongfully interpreted, and to have interpretive authority over the Charter creates "considerable power".¹² An important aspect of its interpretation is the fact that authoritative power is not assigned a single entity within the UN body, though its day to day application lies in the hands of the ICJ, SC, GA and other subsidiary bodies of the UN.¹³

Article 5 of the VCLT states the convention applies to "any treaty which is the constituent instrument of an international organization...". The Charter clearly falls within this definition, but since the Charter was concluded before the VCLT entered into force in 1969, the rules are not directly applicable as stated in Art. 4. Although non-retroactive, Articles 31-33 are still regarded as customary rules and applicable to any treaty in principle, including the Charter. This argument is also strengthened by the Statute of the ICJ as Art. 38(b) states that customary law shall be applied to the disputes submitted to it. This would include the customary rules found in Articles 31-33 in the VCLT. But there are scholars who still ar-

¹⁰ Schweigman (2001) p. 19

¹¹ The former referring to its contractual nature, the latter to its law-making capacity. Rosenne (1989) pp. 182-184

¹² Schwindt (2000) p. 199

¹³ *ibid.* p. 200

gue the Charter resembles more of a constitution than of a treaty and that these customary rules therefore do not apply.¹⁴

A less rigid approach has Shaw who does not necessarily deny the applicability of Articles 31-33, but is in favour of a more flexible interpretational approach when saying:

"The special nature of the constituent instruments as forming not only multilateral agreements but also constitutional documents subject to constant practice, and thus interpretation, both of the intuition itself and of member-states and others in relation to it. This of necessity argues for a more flexible or purpose orientated method of interpretation."¹⁵

By arguing necessity for a more "flexible" or "purpose" oriented method, he shows the Charter has the potential of evolving. This is a development which should be taken into consideration in an interpretational process.

Kahgan has a more specific aim of the interpretation when expressing the goal should be to find the "intent" behind the provision by examining the *travaux preparatoires*, the intention of the parties and the objects and purpose of the text.¹⁶ One problem with Kahgan's approach is that she does not consider that the original intention might be obsolete after 67 years. Skubiszewski therefore points out "the intention of the present majority cannot be explained on the basis of what was said in San Francisco."¹⁷ And when one considers the post WW2 context of the Charter's adoption, this argument is obviously true.

Following Kahgan's thought, an argument could be made that new members to the UN are bound by the previous legal documents, including the *travaux preparatoires*, but this view appears to be too legalistic today.¹⁸ I therefore agree with Schweigman who reasons the

¹⁴ Watson (1994) p. 817

¹⁵ Shaw (1995) p. 778

¹⁶ Kahgan (1997) p. 797

¹⁷ Skubiszewski quoted in Schweigman (2001) p. 16

¹⁸ l.c.

intent of the original parties has lessened in weight and subsequent practice accordingly has become more important.¹⁹

In conclusion there are arguments both in favour and against the applicability of the customary rules of treaty interpretation. Schweigman concludes "Emphasis should be placed on the object and purpose of the organization", and I agree this is not a question of whether the rules themselves apply or not, but of their individual weight when interpreting.²⁰ After all, this is not a purely automatic operation but a process.²¹

Recognising the unique character of the UN through both origin and position, the customary rules are still a good starting point, but with different shades of importance in comparison to how one would interpret ordinary treaties. These rules will therefore be used as interpretational aids, but not regarded as exhaustive or as blueprints when interpreting the Charter.

1.2.2 Principles of interpreting Security Council resolutions

Before the application of any interpretational rule, the terms of the SCR's must first be decided.²² They usually consist of numbered paragraphs, preambles and sometimes annexes. After this decision is made, the natural follow up is to ask what rules are available to interpret them, and can these rules be applied in full? These questions have generally been given little attention.²³ Because resolutions are not treaties, there is a wide consensus that the

¹⁹ Schweigman (2001) p. 17

²⁰ *ibid.* p. 19

²¹ Sinclair (1984) p. 153

²² Wood (1998) p. 86

²³ *ibid.* p. 73

VCLT cannot be directly applied, but can the same principles be applied by analogy?²⁴
This is a question of great importance and answering it is the aim of this discussion.²⁵

The principal judicial authority on interpreting SCR's was the ICJ's Namibia Advisory Opinion:

"The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security council".²⁶

However, this opinion had no immediate reference to the VCLT and the issue at hand was also to the "binding effects" of SCR's and not a general interpretational approach. Wood's says even though this is the case, it does offer "some guidance" to general issues.²⁷ From the section we see the court regards "all circumstances" as an important tool in deciding its meaning. Even the "speeches" hold value which is traditionally regarded as a supplementary means of interpretation and secondary to the wording. Wood's brings up three main points²⁸ to consider when interpreting SCR's:

- 1) The preambles may be useful but should be treated with caution as they sometimes are dumping grounds for proposals not acceptable in a paragraphs form.
- 2) The SCR's may be part of a series and must only be understood as such.
- 3) The uncertainty of the publications authoritativeness.

²⁴ Larsen (2012) p. 364

²⁵ l.c

²⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, para. 114.

²⁷ Wood (1998) p. 75

²⁸ Wood (1998) pp. 86-87

In comparison to treaty interpretation, the preamble is given less weight and the document itself must also be interpreted in the light of previous and later resolutions to get the correct context, and thereof the intention behind it. The wideness of the approach is seemingly the most significant difference from ordinary treaty interpretation.

A newer view on this question came with the ICJ's advisory opinion on Kosovo when it stated:

"Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States [...] irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions."²⁹

The ICJ's viewpoint being that even though the VCLT "may provide guidance", one cannot settle with this approach as "other factors" must also be taken into account. It *inter alia* points to their principal difference of character, and specifically the lacking element of consent which sets SCR's apart from treaties and their contractual element. A much wider interpretational approach has also the ECHR done, when they in *Al-Jedda v. The United Kingdom* said they relied on the advisory opinion on Namibia as guidance.³⁰ The im-

²⁹ ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (2010), para 94.

³⁰ *Al-Jedda v. The United Kingdom* para. 76

portance of considering a "wide range" of factors is evident. This judgement also came after the Kosovo opinion.

Concluding on how to answer this question is no easy task. Wood's uses tentative conclusions in his last passages to help find a method of interpretation. One of these conclusions is to aim for the intention of the Council expressed through their resolutions, but interpreted in the context of the UN Charter.³¹ The tools needed for achieving this goal could naturally be based on the treaty rules but one should not have a goal of applying them all, as this is "highly artificial"³² considering their distinctive attributes. The difference between the general and supplementary rules of interpretation also has less significance here.³³

Larsen says this question has not been fully answered yet, though the aim should also be to find the SC's intention.³⁴ When used as guidance towards finding the intention the VCLT holds value, but one must always bear in mind the differences of character which SCR's possess when applying these rules analogically.³⁵ Therefore, an interpretational approach with these finer points in mind will be applied in the following.

1.3 The relationship between legality and judicial review

A valid objection to the principal questions regards their importance. Why should these questions be examined when the SC solely decide and execute appropriate measures. Malanczuk expressed a similar concern by saying "a threat to the peace seems to be what-

³¹ Wood (1998) p. 95

³² I.c.

³³ I.c.

³⁴ Larsen (2012) p. 367

³⁵ I.c

ever the Security Council says is a threat to the peace."³⁶ Unlawful acts in this context are also rarely pursued. By their exterior these questions undoubtedly seem to hold little value.

What must first be said to this objection is that the reasons in favour of examining these questions far outweigh the ones opposing it. Even though the ICJ has jurisdiction to consider the legality of resolutions, it rarely gets to use its powers. The reality being there is no actual judicial review, which shows the importance of determining the legal status of these resolutions. For the subjects involved this is also important because a determination can create acceptance or reassurance one way or the other. And even though these lines seem hazy at times, especially when dealing with international law, the sole principle of seeking out such answers holds importance and value in itself.

Since resolutions 1970 and 1973 are both exceptions to the main principles of non-intervention in states, placing them in context is important to get a broadened perspective and knowledge of their origin. This calls for a systematic approach beginning with the main rules before narrowing down the focus to the exceptions and the principal questions. Chapter two will therefore outline the basic frame surrounding these resolutions.

2 The main principles of non-intervention

2.1 State sovereignty

A state's territorial integrity and political independence is a key principle *inter alia* in international law. It is found expressed in the UN Charter Art. 2(4) but is also regarded as international customary law, making it binding for all states. The article has been described as "the corner-stone of the Charter system".³⁷ Simply put, it forbids the use or threat of force

³⁶ Malanczuk (1997) p. 426

³⁷ *The Law of Nations: An Introduction to the International Law of Peace* (1978) p. 414

between states. The term "force" does not cover all types of force, but is limited to "armed force" because its main purpose is war-preventing.³⁸

One must further note that this provision has an international element and the use or threat of force within a state is not covered (e.g. civil war), only force between states. By using the terms "territorial integrity" and "political independence", the provision shows that it covers all types of trans-border use of force and not limited to states trying to deprive each other of territory.³⁹

This principle is supplemented by Art. 2(7) which prohibits the UN from getting involved in a state's domestic affairs. However, this rule deals with the UN exclusively, non-interference from "states" fall outside its scope.⁴⁰ This is also the only general *ratione materiae* limit of the Charter.⁴¹ Intervention in this context means those powers given to them by the Charter⁴² while matters that fall within a state's "domestic affairs" are those who are "free from international obligations."⁴³ This means that matters without trans-border implications potentially fall outside the UN's jurisdiction.⁴⁴ As shown in the last sentence of Art. 2(7), the principle shall not prejudice the application of Chapter VII measures, showing that the exceptions found in Chapter VII are fully applicable but on matters outside of a state's domestic affairs, thus limiting the powers of the SC.

³⁸ Brownlie (1963) p. 86

³⁹ *The Charter of the United Nations: A Commentary* (1994) p. 117

⁴⁰ Conforti (2010) p. 156

⁴¹ *l.c*

⁴² *ibid.* p. 170

⁴³ *ibid.* p. 161

⁴⁴ *Ibid.* p. 156

2.2 General exceptions

There are two main exceptions to the prohibition of force principle. A case for a third can be made with regards to the R2P doctrine but will be covered in the next subchapter. The first exception to Art. 2(4) is the rule of individual or collective self-defence found in Art. 51. However, this exception is not applicable to the conflict in Libya as it was not related to self-defence within the scope of Art. 51. It is therefore not relevant to this thesis. Here, the relevant exceptions from Art. 2(4) supplemented by 2(7) are those found in Chapter VII of the Charter.

The member states have in accordance with Art. 24(1) given the SC the primary responsibility for maintaining international peace and security. The SC *prima facie* determines in accordance with Art. 39 if one of three alternative conditions is met. These are either (1) "threat to the peace", (2) "breach of the peace" or (3) "act of aggression." Resolutions 1970 and 1973 concerned themselves solely with a "threat to the peace".

If one of these three alternative conditions are found to be met, and peaceful means are still regarded as adequate measures then Art. 41 can be applied. This article focuses on non-forceful measures e.g. the interruption of economic relations or the severance of diplomatic relations. The measures which are exemplified in the article are not exhaustive. Oosthuizen has said "this requirement could be linked to the concept of good faith and abuse of rights"⁴⁵, meaning there could be limitations even to the use of non-forceful measures, as well as the ordinary limitations that follow use of force. Resolution 1970⁴⁶ was adopted by the SC to deploy non-forceful steps as mentioned in the introduction.

If the SC view peaceful measures as inadequate or they have previously proven to have failed, they can give a resolution permitting the use of force in accordance with Art. 42.

⁴⁵ Oosthuizen (1999) pp. 554-555

⁴⁶ S/RES/1970, 26 February 2011.

The SC changed its view towards Libya only days after passing resolution 1970. It subsequently adopted resolution 1973⁴⁷ as a response to the escalating conflict. The introduction brings up the question of the conflict possibly being regarded as an internal matter. If answered positive one must ask if an internal matter can be a "threat to the peace"? Article 2(7) which forbids interventions in "matters which are essentially within the domestic jurisdiction" could then also be violated. The applicability of this condition will be discussed in Chapter three.

2.3 R2P (Responsibility to protect) - a third exception?

The R2P was "borne out of frustration"⁴⁸ as an answer to the unwillingness of states to act on crimes of mass atrocity, particularly in Rwanda and Kosovo.⁴⁹ "The essence of the R2P is that sovereignty implies responsibility."⁵⁰ This is a shift in the debate from the previous concept of humanitarian intervention, moving away from state sovereignty synonymously meaning control to a concept where sovereignty now means responsibility, including a responsibility to protect.⁵¹

In the 2005 World Summit Outcome Document the meaning was conveyed and the General Assembly adopted this motion.⁵² It specified that the R2P doctrine consists of three pillars.⁵³ The first regards the individual responsibility each state has to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. The second pillar deals with the international community's collective responsibility to support and aid such states by peaceful means when one of the four crimes occur. The fail-safe found in the

⁴⁷ S/RES/1973, 17 March 2011.

⁴⁸ *Human Rights, Intervention, and the Use of Force*. (2008) p. 275

⁴⁹ *l.c.*

⁵⁰ See note n 51 above 278

⁵¹ Peters (2011) p. 5

⁵² A/RES/60/1, 24 October 2005. para 138-140.

⁵³ *The Responsibility to Protect and International Law* (2011) p. 1

third pillar addresses the collective responsibility to take action in accordance with Chapter VII of the UN Charter when diplomatic measures prove or seem inadequate. The commission did not exclude that also other organs of the UN and even regional organizations could exercise the R2P.⁵⁴

A question needed to be answered concerns its legal status. It is highly controversial whether the R2P "is a hard and fast legal obligation, only a political concept, soft law, or an emerging legal norm."⁵⁵ Five nations have already stated they do not regard the R2P as a binding norm, but a concept.⁵⁶ On the other hand we have Canada who called it a "sophisticated normative legal framework based on international law."⁵⁷ Bangladesh chose a middle way when saying it was an emerging normative framework...⁵⁸ This shows there is no international consensus between states on the question.

The Special Adviser to the Secretary-General stated: "[I]t is a political, not legal, concept based on well-established international law and the provisions of the UN Charter."⁵⁹ Saying the doctrine is based on international law but not regarded as law is also how Peters concludes, when she says it is a novel construct built on pre-existing legal principles.⁶⁰ Thus, the concept is still to be regarded a "mere concept" but with some added legal value because it was drafted and based on international legal principles. This is also the understanding that will be used here. In the next chapter, the basis for using force within Libya will first be outlined by interpreting Article 39 of the Charter.

⁵⁴ See note n 51 above 276

⁵⁵ Peters (2011) p. 7

⁵⁶ Brazil (A/63/PV.97, p. 13); Guatemala (A/63/PV.97, p. 14); Morocco (A/63/PV.98, p. 13); China (A/63/PV.98, p. 24); Venezuela (A/63/PV.99, p. 3).

⁵⁷ Canada (A/63/PV.98, p. 26)

⁵⁸ Bangladesh (A/63/PV.100, p. 22)

⁵⁹ Luck. *Remarks to the General Assembly on the Responsibility to Protect*, New York, 23 July 2009.

⁶⁰ Peters (2011) p. 10

3 Legal basis for resolutions 1970 and 1973

3.1 UN Charter Article 39

This article is a prerequisite for both non-military measures and use of force and states:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The relevant condition concerning resolutions 1970 and 1973 is a "threat to the peace" which the SC in resolution 1973 said the situation in Libya continued to be.⁶¹ The SC has interpreted this condition for almost 70 years and one could argue there is nothing more to interpret at this stage. But this does not change the fact that the wording is still the main legal basis for SC authorization. And to see if the SC has acted within its legal limits, the wording must be first be interpreted and its findings applied to their positive acts. This will show if there is in fact a discrepancy between their actual legal powers and the adoption of these resolutions.

Neither of the conditions in Art. 39 are defined in the charter. The *travaux preparatoires* suggests this was done deliberately, leaving us to fall back on the principles of treaty interpretation.⁶² The starting point is therefore to interpret a "threat to the peace" in "good faith" and in accordance with the "ordinary meaning" and in the "light of its object and purpose."⁶³

The first step is to divide the condition and interpret each of its words, beginning with the ordinary meaning of "peace" which is "notoriously relative and subjective".⁶⁴

⁶¹ S/RES/1973, 17 March 2011. para. 21

⁶² Schweigman (2001) p. 34

⁶³ VCLT Article 31

⁶⁴ Lepard (2002) p. 150

3.1.1 "Peace"

To find the ordinary meaning of a word, the dictionary is the natural starting point. The Oxford dictionary defines "peace" as:

"freedom from, or cessation of, war or hostilities."⁶⁵

The dictionary's definition is broad and seems to cover most situations containing a minimum level of aggression. This could be characterised as a negative definition of peace.⁶⁶ However, recent SC practice shows that "peace" is now regarded in a more positive manner, making it questionable if this minimum level suffices.⁶⁷ Conforti says the tendency now is to view peace as "political, social and economic circumstances that obstruct the rising of future conflicts."⁶⁸ This evolution shows that peace cannot merely be viewed as the freedom from of war, but as a much wider concept. But it may still be assumed that "peace" means the absence of organized force in Chapter VII and this is the conclusion here.⁶⁹ The next word being a "threat" is described as "the broadest and most indistinct concept in Art. 39 ...".⁷⁰

3.1.2 "Threat"

The word "threat" is defined as:

"A declaration of an intention to inflict pain, injury, damage or other punishment in retribution for something done or not done."⁷¹

⁶⁵ *Shorter Oxford English Dictionary* (2007) p. 2131

⁶⁶ Schweigman (2001) p. 34

⁶⁷ Skubiszewski (1982) pp. 74-78

⁶⁸ Conforti (2010) p. 205

⁶⁹ Lailach (1998) pp. 31-36

⁷⁰ *The Charter of the United Nations: A Commentary* (2002) p. 722 on Kelsen (2000) pp. 727-728 and 737.

⁷¹ *Shorter Oxford English Dictionary* (2007) p. 3248

The wording implies the threat needs not to have led to any sort of manifested damage, but the intention of such damage must be apparent at the time the threat is put forth. An impending armed conflict between states is the classic case to fit the bill.⁷² One could argue this condition is no longer met when the damage actually manifests itself considering it has then moved beyond being a mere "threat".

The alternative conditions in Art. 39 of "act of aggression" and "breach of the peace" seem better suited for those situations. Though the wording seems limiting, the SC has in fact found on-going conflicts to represent a "threat to the peace" and consequently blurred the distinction.⁷³ Another problem with the wording is it gives no exact answer to the degree of probability that must exist.⁷⁴

A "threat" under Art. 2(4) has been described by the ICJ as "a declared readiness of a state to use force."⁷⁵ Even though this is not directly transferable as it does not regard the interpretation of Art. 39 itself, it still indicates how the condition could be regarded and supports an interpretation based on its ordinary meaning. The "readiness" of a state closely resembling the part of intent to cause damage.

A pure textual interpretation of the words "peace" and "threat" has now been done. There is still a significant element left to be discussed, an element not visible when solely focusing on the wording itself. The Charter must be read as a whole and applying this view the next step.

⁷² See note n 75 above 722

⁷³ See note n 75 above 723

⁷⁴ Lepard (2002) p. 151

⁷⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, para. 47.

3.1.3 "International"

The Charter being an international instrument means both content and execution thrives on building international relations, trans-border cooperation and preventing wars. When this is the broader context, interpretational findings must be applied within an international light to be in conformity with the Charter. This is clear when reading Art.1(1) with its goal of "international peace", 2(3) about resolving "international disputes", and 2(4) dealing with "international relations". The preamble also emphasizes the goal of maintaining "international peace". This means one must read a "threat" as being towards the "international peace", and not just the "peace" itself as Art. 39 read out of context might imply. But what is the meaning of "international peace"?

At first glance the wording immediately leads one to think of inter-state conflicts, and disregard purely internal matters as the Charter prescribes through Art. 2(7). Lepard on the other hand brings up the question of whether "international peace" can be read with a broader viewpoint, which would include peace within state borders as well as across borders.⁷⁶ He calls this a "holistic definition".⁷⁷

One argument in favour of a holistic definition is Art. 1(2) which aims for "universal peace". This could be as Lepard writes an implication of peace both within and between states.⁷⁸ A second argument in favour is the Charter read as a whole, which shows a concern for peace and human rights "within all countries...".⁷⁹ Against this a strong principle of non-intervention in internal affairs still resides on firm grounds with Art. 2(7). Lepard argues that even though this is true, it would "at the very least" seem to "cast doubt" on the matter with the arguments above.⁸⁰ An argument could perhaps be made that the wording

⁷⁶ Lepard (2002) p. 150

⁷⁷ *ibid.* p. 151

⁷⁸ *ibid.* p. 151

⁷⁹ *ibid.* p. 162

⁸⁰ *ibid.* p. 164

of 2(7) stating that matters "essentially within the domestic jurisdiction" does not expressly rule out that an internal matter could be regarded as a threat to the international peace.

Summarizing these arguments it would appear that though questionable, the stronger textual support based on the international element present throughout the Charter lies in the traditional definition, which implies the threat must to some degree have border crossing potential.

3.1.4 Partial conclusions

There are two potential problems with this textual interpretation. The first regards the definition of a threat as a "declaration of an intention". Because the Charter's purpose is to prevent threats to the international peace, no intent to create harm can be required as it could endanger such a purpose. A "risk of harm" seems more precise in the light of the Charter's main object and purpose.

Secondly you have the part of retribution. Here there must be a link between the threat and previous acts or omissions. Although most threats are based on previous acts, this does not automatically mean they all are. By applying such a narrow interpretational approach, the room for action might be considered too small and unrealistic on an international scale. When taking into consideration these concerns, the following textual interpretation is left:

"A risk of harm beyond the borders of a host state towards the absence of organized force within a receiving state."

One cannot settle solely with a textual interpretation as this is only regarded the first step of many in an interpretational process. As subsequent practice is gaining more weight as an interpretational factor, this must be further examined as expressed through VCLT Art. 31(3)(b). The subsequent practice being important for two main reasons: The first to see how the SC itself practices and understands the provision, while the second is to see if the wording has evolved since its initial ratification.

3.2 Subsequent Security Council practice

In resolution 1973 the SC e.g. expressed a "grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties" in Libya. The following situations have all been found to meet the requirement of being a "threat to the peace" and are chosen due to their similarities with Libya regarding grave humanitarian concerns.

It is a fact that the SC though acting under Chapter VII does not always "determine" a threat to the peace but use different wordings as substitutes. The word "concerned" accompanied by "gravely or deeply" was formally used on Iraq⁸¹, Somalia⁸² and Yugoslavia.⁸³

The reason for this says Chesterman is:

"though imprecise, these resolutions were all adopted in the early years of the recent period of interventionism – it may not be an exaggeration to suggest that the Council was still experimenting with its new found powers."⁸⁴

He argues the intent to determine the situation as a "threat to the peace" was there, though formally expressed through different words, and this will also be assumed in the following.

Before SCR's 1970 and 1973 the Libya conflict as mentioned could have been regarded an internal conflict only, and since the textual interpretation supports regarding such situations as being outside the scope of a "threat to the peace", the question to answer is if a "threat to the peace" can cover more than merely inter-state conflicts based on the SC's practice.

An interesting opening observation in this light is the Tadic case where the ICTY *obiter dicta* in para. 30 stated that a conflict can be considered a threat to the peace, even though

⁸¹ S/RES/688, 5 April 1991

⁸² S/RES/733, 23 January 1992

⁸³ S/RES/713, 25 September 1991

⁸⁴ Chesterman (2001) p. 127

regarded an internal conflict only with regards to settled practice of the Security Council.⁸⁵ Though this might be considered a bold statement, the ICTY consists of legal scholars from all over the world whose opinion has legal relevance. How much weight one should assign such opinions is a different question. This must at least be interpreted as an indication on how a highly ranked judicial body has viewed the SC practice over the last years. It should also be noted that this opinion was voiced in 1995, which is after the adoption of most of the resolutions discussed in the following with some exceptions.

3.2.1 Iraq

As a result of Saddam Hussein's repression of the civilian population in Iraq, the SC adopted resolution 688 in 1991 condemning and urging the international community to take immediate action through humanitarian relief. A "threat to the peace" was found met and reasoned by "a massive flow of refugees towards and across international frontiers and cross border incursions."⁸⁶ Orakhelashvili points out that the reasoning was not based on the repression itself, but the "consequences" of the repression as shown in operative paragraph 1 of the resolution.⁸⁷

There are two alternative reasons behind the resolution. This view is also strengthened by the use of the plural verb "threaten."⁸⁸ There is a "refugee argument" and a "cross border incursions" argument. The second reason is difficult to address since the rationale behind seems vague and lacking. The following focus will therefore be towards the refugee argument.

⁸⁵ Prosecutor v. Dusko Tadic a/k/a "DULE"

⁸⁶ See note n 86 above para. 3

⁸⁷ Orakhelashvili (2006) p. 80

⁸⁸ Chesterman (2001) p. 132

A question of the level of threat in which these refugees possess must first be addressed. A point here is the fact that there was no manifested harm to the receiving states at the time of the resolution, only the risk. And receiving refugees cannot be characterised as a threat to a state's peace in the classical sense. This is pushing the "threat" spectre.

Yemen and Zimbabwe also argued this way by saying the refugee argument was only a cover to intervene in Iraq's domestic jurisdiction.⁸⁹ The lacking threat level is apparent if one regards refugees in the typical sense, as people who mainly seek peace from hostilities and war in their home states, and who do not actively pursue the direct opposite. But the amount of refugees here (regarded as "massive") could arguably create tensions and hostilities in the receiving states. And such tensions and hostilities could strengthen over time if care and protection were to be lacking.

Whether "refugee hostilities" could amount to a "threat to the peace" in Iraq's neighbouring states is a doubtful question. The short answer is yes, they could possibly possess such a threat over time, but not immediately. Since there was no concrete evidence of the refugees being an immediate threat, a strong argument in the favour of regarding the wording of a "threat to the peace" as being stretched can be made.

This was the first time the SC had accepted that an "internal repression" could have "trans-boundary effects."⁹⁰ Notwithstanding the most controversial and least supported resolution on Iraq with ten votes to three.⁹¹ Its biggest problem is seemingly the fact that it was not applied under Chapter VII of the Charter. The resolution does not say it was applied under Chapter VII and British officials have also admitted to this fact.⁹² Its overall value must be regarded as limited when taking this into consideration.

⁸⁹ Chesterman (2001) p. 132

⁹⁰ *Humanitarian Intervention and International Relations* (2004) p. 33

⁹¹ Chesterman (2001) p. 133

⁹² *ibid.* p. 132

Another problem says Welsh is the fact that the resolution would not have secured the necessary votes if it was to be based purely on humanitarian grounds. She argues in favour of this view because the six-non permanent members who voted for it did not want to set any precedent as portrayed through their speeches.⁹³ A last and final point could be to put a spin on the traditional rights in customary law of victorious states and view these resolutions as a product of such rights.⁹⁴ Victor's after all have a responsibility and say in the aftermath of war.

Schrijver on the other hand notes that the self-determination of the Kurdish people and protection of them lead to the situation being "international".⁹⁵ This could of course give the resolutions firmer grounds but can hardly justify the resolution alone. Orakhelashvili would also disagree with this view as he does not regard the repression itself but the consequences as a reason behind its adoption.

Concluding that a massive flow of refugees is a "threat to the peace" is both difficult and questionable. On the other hand, the majority of the SC did not intend to base this resolution purely on humanitarian grounds, though the resolution itself appears to be evidence of the contrary. The fact remains that it did not get applied under Chapter VII and this seems to be one of the decisive elements of its acceptance. But if nothing else, a resolution not intended to be based purely on humanitarian grounds could perhaps be seen as evidence of a slight change in attitude towards willingness in doing so, especially when its content points that way.

⁹³ See note n 86 above 33

⁹⁴ Roberts (1993) p. 437

⁹⁵ Schrijver (1998) pp. 352-353

3.2.2 Yugoslavia

Violent tensions between different ethnic groups, underlined by cultural and political differences led to the Yugoslavian wars between the years 1991-2001. The wars were between those republics seeking independence on the one side and the Belgrade government wanting to still keep control on the other.

Article 2(7) was given a "prominent role" by the majority of SC members who considered the tensions of being an internal affair for a considerable amount of time.⁹⁶ Resolution 713 changed this when it imposed an arms-embargo under Chapter VII "for the purposes of establishing peace and stability in Yugoslavia."⁹⁷ The background being as stated in the preamble that "heavy loss of human life and material damage" and by "consequences for the countries of the region, in particular in the border areas of neighbouring countries." Only Yugoslavia's consent to the resolution avoided a Chinese veto⁹⁸, though this did not change the fact that the resolution had still to be determined under Art. 39.⁹⁹

A divided reasoning seems to be behind the resolution. The first regarding the heavy loss of human life and the second being the threat to the neighbouring states. Concentrating on the border argument, Chesterman assumes this to be minor at best and says one can argue that this is an example of the SC intervening in a purely domestic matter.¹⁰⁰

What might weaken Chesterman's argument is the fact that we are now dealing with a much more volatile and aggressive situation in comparison to Iraq. The heightened level of aggression is a key difference.¹⁰¹ The risk towards the peace of the region was arguably

⁹⁶ Manusama (2006) p. 76

⁹⁷ S/RES/713, 25 September 1991. Nr. 6

⁹⁸ S/PV. 3009 (1991) pp. 49-51 (China)

⁹⁹ Chesterman (2001) p. 133

¹⁰⁰ *ibid.* p. 134

¹⁰¹ Glennon (1995) p. 72

higher in Yugoslavia than basing it solely on the flow of refugees as in Iraq. Similar views were held by the Soviet Union and United Kingdom "because it had 'spill over' effects" and was therefore a matter of "international concern."¹⁰²

Another point that must be discussed is the importance of consent. Did consent affect the adoption? Manusama says though regarded a civil war, it was based on the possible influence on the peace of the region and consent was therefore redundant.¹⁰³ Based on these arguments the following conclusion is we still have no significant departure from the traditional approach to the "threat to the peace" condition.¹⁰⁴

In the later resolution 827, the SC expressed the following:

"its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive organised and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory."¹⁰⁵

Once again determining the situation continued to threaten the peace, reasoned by breaches of humanitarian law "within the territory." At this point, new separate states were recognized by the UN and the conflict could therefore not only be seen as having the potential of reaching other borders but actually being between states. Croatia, Slovenia and Bosnia and Herzegovina were admitted members to the UN on 22 May 1992.¹⁰⁶ In other words, the internal conflict was now regarded an intra-state conflict. This is clearly shown in the wording by using the phrase: "territory of the former Yugoslavia".

¹⁰² Manusama (2006) p. 77

¹⁰³ *l.c.*

¹⁰⁴ O'Connell (1998) p. 486

¹⁰⁵ S/RES/827, 25 May 1993. para. 3

¹⁰⁶ GA Res 46/236 1992 (Slovenia), GA Res 46/237 1992 (Bosnia and Herzegovina) and GA Res 46/238 1992 (Croatia).

3.2.3 Somalia

A *coup d'état* by Mohammed Siad Barre led a single party controlling Somalia and movements like the USC and SSDF were quickly formed as a response. These clan based movements soon battled for control and civil war broke out.¹⁰⁷ The civil war in Somalia led to numerous SC resolutions but 733 adopted in 1992 confirmed the humanitarian disaster now had reached a level that "threatened the peace". This was reasoned by "heavy loss of human life" and "widespread material damage" that could have consequences on the "stability and peace in the region."¹⁰⁸

The Secretary General of the UN reported in accordance with paragraph 10 of the resolution the following:

"The conflict has threatened the instability of the Horn of Africa and its continuation has occasioned threats to international peace and security in the area. The countries in the region- Djibouti, Ethiopia, Kenya and the Sudan, some more than others, are beset by problems that are largely common to all. As a result, the exacerbation of conflict in one of the countries of the region could have serious repercussions in one or more of the others."¹⁰⁹

The SC viewed the conflict to have border crossing potential, but why? No refugee argument was used as justification this time. Chesterman argues this might have been a relevant "consequence" even if it wasn't formally expressed.¹¹⁰ The Secretary General's report post resolution could neither be used since it was not available at the time of the adoption. One could ask if the real rationale behind the resolution was concealed because only by confirming that the region could be impacted, could the SC sanction measures preventing further loss of lives. The following resolution may have answered this question.

¹⁰⁷ Schweigman (2001) p. 117

¹⁰⁸ S/RES/733, 23 January 1992. para. 4

¹⁰⁹ S/23693, 11 March 1992. para. 12

¹¹⁰ Chesterman (2001) pp. 140-141

Resolution 794¹¹¹ was one of many subsequent to 733 and reaffirmed the previous ones e.g. The ground breaking part of it was the fact that the SC now determined the human tragedy itself as a threat to the international peace and security and sanctioned the use of "all necessary means". This is clear departure from the definition and shows a new line of interpretation with less emphasis on the trans-border effects and increasingly more to the suffering.¹¹² In response to the later resolution 814 which expanded the presence of UN forces, the Secretary-General Boutros-Ghali called it the first time the U.N had used force for "exclusively, humanitarian, internal reasons" as quoted in O'Connell.¹¹³

When trying to distinguish the Somali situation from others, two words in resolution 733 stand out: "unique character". This makes the argument for an exception from the main principles rather than the beginning of a new norm. Roberts argues the intervention was "not a case of intervention against the will of government, but of intervention when there is a lack of government."¹¹⁴ He further points to the fact that it could have been justified in the terms of a "long standing proposition in international law" that allows for an intervention when a "state collapses".¹¹⁵ His point can therefore be seen as justification on an alternative basis and therefore acceptable even though formally executed through Chapter VII.

As we summarize arguments in favour and against, it is apparent that the SC went beyond the traditional approach to a "threat to the peace" and intended to do so with the wording in these resolutions. The difficult part is to extract any certainties or principles from them because of the unique situation in Somalia. When no government exists, neither can consent, leaving the international community with very few options. These resolutions can therefore

¹¹¹ S/RES/794, 3 December 1992. para. 3

¹¹² *The Charter of the United Nations: A Commentary* (2002) p. 724

¹¹³ O'Connell (1998) p. 487

¹¹⁴ Roberts (1993) p. 440

¹¹⁵ *l.c.*

not stand their ground independently but must be used as a foundation and be built on by similar SC interpretations for them to be accepted as a new direction.

3.2.4 Rwanda

The genocide of the Tutsi minority by the Hutu population led to hundreds of thousands of deaths but the SC never sanctioned military intervention to stop the genocide. Resolution 918 determined that the situation constituted a "threat to the peace and security in the region." There is no clear reasoning behind this determination in the resolution itself so one must first interpret it, and then view it in context in the hopes of finding these grounds.

It clearly condemns "numerous killings of civilians" and violations of humanitarian law, which is a point in favour of saying the reasoning was to some extent based on humanitarian grounds. Österdahl says "it was clear that there was indeed a massive flow of refugees to the neighbouring countries, primarily to Zaire."¹¹⁶ Again we see the refugee argument surface as possible grounds for an intervention. This argument could possibly be linked to the wording, though a weak one when it stated that the SC was "concerned that the continuation of the situation in Rwanda constitutes a threat to the peace and security in the region"¹¹⁷ Uncertainty still fills the air to the extent it might have impacted the resolution directly.

A point which Chesterman brings up is the fact that the above mentioned arguments do not belong to part B of the resolution where the SC actually applied Chapter VII and imposed an arms embargo.¹¹⁸ In part B they "merely determined" the situation constituted a threat to peace and security without elaborating on why. This could diminish the value of the humanitarian argument. One could argue that would humanitarian grounds

¹¹⁶ Österdahl (1998) p. 59

¹¹⁷ S/RES/918, 17 May 1994, para 18

¹¹⁸ Chesterman (2001) pp. 145-146

be the real reasoning, the SC would have stated it clearly in part B as well. On the other hand, the concerns had already been aired through the operational paragraphs and therefore not needed to be reiterated.

In the subsequent resolution 929 the SC determined the "magnitude of the humanitarian crisis in Rwanda constituted a threat to the peace and security in the region." Here it is clear that the humanitarian crisis was the reason for a potentially trans boundary conflict. There is no mentioning of refugees as reasoning. And since the level of aggression towards other states regarding an internal conflict is small, it shows how the "threat" condition is applied on areas outside its ordinary scope.

In comparison to other conflicts, its reasoning seems closer to Iraq than Somalia or Yugoslavia, even though the SC stated that the situation in Rwanda also constituted a "unique case."¹¹⁹ This is because the conflict did not contain the same level of aggression as seen in Yugoslavia, nor did alternative grounds exist for implementing measures as in Somalia. These considerations lead to the conclusion that the SC had in fact stretched the wording.

3.2.5 Haiti

A violent uprising against the rule of now former president Jean-Bertrand Aristide was fueled by years of human rights abuse. After serving two terms and failing to deliver on previous promises, the opposition coalition known as the Democratic Platform of Civil Society and Political Parties had refused to comprise with the president and demanded his resignation.¹²⁰ As no comprise was reached, an insurrection begun which in the end led to a *coup d'état*.

¹¹⁹ S/RES/929, 22 June 1994, para. 9

¹²⁰ Human Rights Watch (2004)

An international response came through resolution 1529 where the SC determined that the situation continued to threaten the peace.¹²¹ This *inter alia* led to the immediate deployment of MIF forces. To understand why the situation "continued" to threaten to peace, an interpretation of the resolutions predecessor must be done. The preamble of resolution 841 also mentions as reasons: "the incidence of humanitarian crisis, including mass displacements of population", and the "climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member states". Concern has been expressed to the value of SCR preambles so these reasons cannot be applied without scrutiny.¹²²

The refugee argument is at least "arguable" as justification though the numbers of refugees are small in comparison to the situation in Iraq, Somalia and Rwanda.¹²³ The other reasons are purely internal with regards to consequences. Various commentators have also questioned the legality as quoted in Chesterman.¹²⁴

The later resolution 1542 noted that the situation in Haiti "continues to constitute a threat to the international peace and security in the region"¹²⁵, though the facts of the situation had not changed substantially. It seems that these facts have been "fitted" to the Article and not applied in their natural state. This is certainly a way of legitimizing SC action but perhaps in a factitious and misleading way. And "this is clearly an atypical conception of a threat to the international peace and security."¹²⁶

¹²¹ S/RES/1529, 29 February 2004. para. 3

¹²² See note n 33 above

¹²³ Chesterman (2001) p. 153

¹²⁴ *I.c.*

¹²⁵ S/RES/1542, 30 April 2004. para. 10

¹²⁶ Chesterman (2001) p. 153

Schelling brings the question up to a new level when he asks whether "some collective and formally integrated attack on [global] issues can do a better job than coping piecemeal, ad hoc, unilaterally, opportunistically."¹²⁷ All in all these resolutions show the SC has stretched both concept and wording of the "threat to the peace" condition.

3.2.6 Partial conclusions

Our opening question was whether a "threat to the peace" can cover more than merely inter-state conflicts based on the SC's practice. A textual interpretation in the light of the object of purpose of the Charter arguably gives little room for such an expanded view. And the SC itself has previously "rejected jurisdiction when involvement would have infringed matters that did not have clear international repercussions..."¹²⁸ But there is still an added dilemma between balancing sovereignty and the enhanced status of human rights.¹²⁹

Is there any 'common thread' within the resolutions discussed here? The extraordinary circumstances in Somalia make for a less interesting comparison, but the others? On the one side of the spectre you have the Yugoslavia conflict, which positively seems to be on more solid grounds due to the level of aggression. This of course is debatable and one must note that there are not huge differences but shades that separate these resolutions.

On the other side you have for example Iraq, where an argument for the refugee point was made but where the share lack of aggression was apparent. The SC also expressed they were "gravely concerned by the repression of the Iraqi civilian population" and "deeply disturbed by the magnitude of the human suffering". In Rwanda the SC condemned the killings of civilians and breaches of humanitarian law. Resolution 1529 concerning Haiti expressed "utmost concern" for violence in Haiti and rapid deterioration of the "humanitar-

¹²⁷ Schelling (1992) p. 196

¹²⁸ Manusama (2006) p. 57

¹²⁹ *ibid.* p. 237

ian situation". A pattern of basing resolutions on grave humanitarian disasters seems evident though formally expressed as the possible effects those disasters could have towards the peace of "the region".¹³⁰ Somalia being the clearest example of a clear departure from the wording though Iraq, Rwanda and Haiti also fuel this way of reasoning.

But are human rights violations themselves a "threat to the peace" or their possible consequences? The discussed practices show the focus lies mainly on the "consequences" and not on the acts themselves, most prominently shown in the Iraq conflict with the repression of Kurds.

One could also view the opening question from a different angle like Fassbender does. He argues the evolution of human rights shows that this no longer can be considered an internal matter only, and therefore does not affect the prohibition of domestic intervention.¹³¹ The SC's practice gives this view considerable weight as they often argue towards the cross-border effects of human rights violations.

He further argues that respect for human rights are now an *erga omnes* obligation and internal armed conflicts are already regulated by the law of armed conflict, "hence not a matter of domestic jurisdiction."¹³² These additional arguments give further weight to his reasoning of accepting that human rights conflicts can have implications beyond their starting grounds. But instead of arguing that the condition itself has expanded, his view regards the conflicts and their evolution. From being regarded as something belonging to a state's domestic jurisdiction, to now being a concern of the international community as a whole.

Either one concludes that the condition has expanded by practice or the conflicts themselves have evolved, the resolutions outlined here: "illustrate the broadening of the notion

¹³⁰ See Resolutions 688, 733, 1529, in para. 3

¹³¹ *Securing Human Rights: Achievements and Challenges of the UN Security Council* (2011) p. 47

¹³² *l.c*

of threat to the peace"¹³³ and that the SC does not consider its mandate to be limited to inter-State conflicts.¹³⁴

3.3 Applying Article 39 to the conflict

3.3.1.1 Resolution 1970

Both resolutions were applied under Chapter VII of the Charter as a response to a "threat to the peace."¹³⁵ However, only resolution 1973 had a "determination" of the situation amounting to that threat level. The condition of "determining" a situation was previously discussed above and must be regarded as having little importance. It will therefore not be pursued.

Beginning with resolution 1970, no direct link seems visible between a reason and the application of Art. 39. But the resolution is not lacking of possible reasons as such. These reasons have therefore been divided and put into three separate brackets for an overview:

1. A cross border refugee argument:
 - "plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya"
2. Arguments based on humanitarian grounds:
 - "condemning the violence and use of force against civilians"
 - "considering it to amount to crimes against humanity"
 - "gross and systematic violation of human rights"
 - "rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government"

¹³³ See note n 136 above p. 46

¹³⁴ Orakhelashvili (2006) p. 82

¹³⁵ S/RES/1970 and S/RES/1973 note 5 and 6 above, para. 16 and 21.

3. An argument possible based on the R2P doctrine:

- "the Libyan authorities responsibility to protect its population"

Starting with the refugee argument, it is at least arguable that refugees could threaten the peace in neighbouring states if large numbers were to follow. However, the resolution does not give any clear indication to the fact that we are dealing with either minor or large amounts of refugees. The word "plight" meaning "dangerous" or "difficult" by its ordinary use might be an indication of a high number. On the other hand, it might simply be towards the dangerous journey that refugees must undertake to be able to cross into neighbouring states, these are uncertainties.

Another initial thought could be to view this argument as a "safety valve" of sorts regarding the resolutions legality. By throwing it in the mix of arguments, it at least strengthens the authorizations legitimacy externally, even though the argument itself seems dubious at best. This is apparent when one views all these arguments together since the refugee argument stands out. It has a stronger legal base compared to the others by it fitting a more classic approach to a "threat to the peace" and also corresponds well with Iraq and Haiti and the value of cross border refugees in those conflicts.

An overwhelming amount of arguments evidently belong to the second bracket and concern grave breaches of human rights within Libya. When 4/6 main arguments solely concern themselves with human rights, they cannot be disregarded and must be viewed as a clear statement of their importance. This argument also corresponds with the previously outlined trend of the SC now accepting humanitarian concerns as international elements and not only belonging to a state's domestic jurisdiction.

Fassbender has previously argued in this direction¹³⁶ and his arguments can find themselves strengthened by the adoption of this resolution. The evolution of "peace" from containing a mere negative definition to now also having positive elements is also shown by this reasoning, since the humanitarian concerns seem to be the main justification for applying Art. 39.

The third and last bracket is seemingly a direct reference to the R2P doctrine and the "Libyan authorities" responsibility to act. The crimes within Libya clearly fall under the category of "crimes against humanity" as defined through the Rome Statute of the International Criminal Court.¹³⁷ The SC also said they considered the crimes in Libya to amount to this level.¹³⁸ The international community had also tried and failed with its non-forceful measures as the second pillar of the R2P proscribes, meaning that appropriate action within Chapter VII must be taken.

Viewing these brackets separately, their reasons could arguably be said to be lacking the necessary level needed for SC authorization. This argument is strengthened when viewed strictly from a traditional angle. But read as a whole, and with a broadened concept of "peace" in mind, it is clear that they together suffice as a "threat to the peace" in the light of the Charter and newer practice. Focusing on the R2P doctrine, though perhaps not a legal norm itself, it is met if one accepts that domestic breaches of human rights are experiencing "internationalisation".

3.3.1.2 Resolution 1973

The SC determined the situation "continued" to constitute a threat to the international peace and security as Art. 39 prescribes. It further reiterated the importance of the R2P doctrine

¹³⁶ See note 131 above

¹³⁷ Article 7

¹³⁸ S/RES/1970, 26 February 2011. para. 6

and the concern for refugees while also condemning grave breaches of humanitarian law. Since the situation was found to be deteriorating, the SC authorized military force. The justification was stronger at this stage because of the deteriorating situation and by consequence a heightened threat level. New reasons were also added to this resolution but taking into consideration all the circumstances, they do not add any significant value to the totality of the justification.

3.4 Final conclusions to Chapter Three

The first objective of this thesis was to see if the SC had acted within their prescribed powers when finding the situation in Libya amounted to a "threat to the peace." One of the opening remarks questioned if the conflict in Libya could be viewed in an international light when it appeared to have domestic limitations attached to it. An easy approach to this question would be to jump directly on the refugee argument and conclude that refugees clearly have international repercussions and therefore these authorizations must be lawful.

The problem with choosing such a narrow approach is one could miss the broader picture so one cannot stop at this point. SCR's are unique in the sense that their creation demands tremendous political support from all corners of the world and careful consideration from those granting it. And even though they cannot be characterised as typical legal documents, possible consequences deriving from such resolutions are without precedent. A pure textual and rigid interpretation has proven to be less fruitful when applying the rules of legality on these authorizations as they demand a wider understanding.

When moving beyond the two resolutions at hand, their predecessors have clearly shown the on-going evolution of human rights as a concept and its increasing importance on the international arena. Not forgetting these resolutions themselves contribute to the growing understanding and broadening of the concept. One must neither forget that these resolutions have taken a step further by acknowledging the R2P doctrine, a theory that might evolve into something more tangible in time. This leads to the conclusion that the SC has acted within its legal powers when adopting these resolutions.

4 The legality of the military operations

4.1 Moving from *jus ad bellum* to *jus in bello*

Military action is considered a last resort when trying to resolve conflicts and is never a preferred choice by the parties involved. Its deployment shows the shortcomings of diplomatic measures and other peaceful tools of dispute settlement. One could say the use of force does not resolve a conflict as such, but rather end it. With the use of force follows a wide range of uncertainties, these relate *inter alia* to them being successful without a massive bloodshed. But consequences derived from use of force both can and will lead to loss of innocent lives, this is the only sure thing. A large responsibility therefore rests on the shoulders of each and every soldier deployed within a military mandate and their higher ranking officials.

The first international response to the adoption of SCR 1973 came two days later with the deployment of Operation Odyssey Dawn, an operation which was not run by NATO but by a multinational coalition led by the United States. Officials of the U.S government said its goal was to "prevent further attacks by regime forces on Libyan citizens" and "degrade the ability of Moammar Gadhafi's regime to resist a no-fly zone being implemented."¹³⁹

NATO first made its presence known on 22 March 2011 when it launched an operation to enforce the arms embargo. NATO ships stationed in the Mediterranean Sea were used to cut off the flow of weapons to Libya. This marked the beginning of Operation Unified Protector (OUP). The organisation further agreed to enforce the authorized no-fly zone on 24 March before taking the sole command over the military operations on 31 March.¹⁴⁰

¹³⁹ Garamone, American Forces Press Service (2011)

¹⁴⁰ NATO and Libya. *Responding to the United Nations' call*

NATO itself describes the OUP to be made up of three main components¹⁴¹:

1. Enforcing an arms embargo in the Mediterranean Sea to prevent the transfer of arms, related materials and mercenaries to Libya
2. Enforcing a no-fly zone to prevent aircrafts from bombing civilian targets
3. Conducting air and naval strikes against military forces involved in attacks or threatening to attack Libyan civilians and civilian populated areas

These components are all within the legal limits of the authorization and leads to the question of them actually being enforced within the frame of legality.

There are two sets of rules that apply to this question. International humanitarian law is imposed on all parties to an armed conflict, meaning both al-Gaddafi and coalition forces are subjects to these principles of war. NATO must therefore (1) act within the mandate and (2) the rules of IHL to be within their legal limits. An act could therefore be found to be in conformity with the mandate, but in breach of IHL and vice versa. A distinction between these rules will therefore have to be made. A violation either way makes the act unlawful. Legality therefore depends on the act being within the overlapping circles of both rule sets.

Consequence attached to a violation also depends on which rule set is breached. The mandate limits sanctions to those within the UN system, while a grave breach of IHL can lead the violation to be regarded as a war crime and pursued as such. Here the focus is not towards the consequences of a breach, but rather the principle question of legality. To be able to answer this question, both the authorization and IHL must be interpreted and applied to NATO's acts.

The next chapter will begin by interpreting the resolution extensively as it has many interpretational concerns before Chapter 4.3 outlines the basic principles of IHL. Application of

¹⁴¹ NATO and Libya. *Commitment to protecting the Libyan people*

both rule sets will be done in Chapter 4.4 by narrowing down the questions to those most doubtful concerning legality.

4.2 Interpreting the mandate

4.2.1 What are "all necessary measures"?

Resolution 1973 authorized the use of "all necessary measures" to "protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi." The only clearly expressed exclusion regards a foreign occupation force on Libyan soil.¹⁴²

An overview of conditions needed for forceful measures to be available:

A "threat of attack" in Libya towards either:

- Civilians, or
- Civilian populated areas



"all necessary measures"

Excluding: occupancy

By using the words "all necessary measures", the SC has given a wide discretion to the coalition forces, including use of military force.¹⁴³ But the link between the civilian element and the measures shows this discretion is limited to measures needed to "protect civilians" and "civilian populated areas" under "threat of attack." This means that forceful measures cannot be deployed towards any other aim or purpose besides the good of the civilian population. Taking military action with a different purpose in mind will be in direct violation of the Charter's principle of prohibiting force in Art. 2(4) and considered illegal.

¹⁴² S/RES/1973, 17 March 2011. nr. 4

¹⁴³ Larsen (2012) p. 368

4.2.2 What are "necessary" measures?

This condition could be interpreted as "essential" or "only means possible". The argument being that military measures not essential in protecting the civilian objective fall outside the scope of authorization. An interpretation on this basis would be very limiting if not damaging to the coalition forces. The more likely interpretation is to view the main intent behind the resolution as not limiting the measures as such, but rather the aim of which these measures may be deployed towards. With this view in hand, an argument could also be made that the choice of measures should be proportionate to achieve the civilian objective.¹⁴⁴ This thought touches upon the rules of IHL, but is still a reasonable one considering the purpose behind the resolution is to protect civilians and not cause unnecessary damage.

4.2.3 Who are "civilians"?

The next question to ask is who is defined as "civilians" in this context and enjoy the protection as subjects since this is not defined in the mandate. The ordinary meaning implies someone outside of an armed conflict. Article. 50(1) in Protocol 1 to the Geneva Conventions has a negative definition and states:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.¹⁴⁵

These categories refer mainly to prisoners of war and armed forces of a party. The protocols applicability is based on 172 states currently being party to it, including Libya.¹⁴⁶ Civilians are therefore people who have not taken up arms or joined armed forces on either side, the non-combatants.¹⁴⁷ When in doubt whether or not a person should be classified a

¹⁴⁴ Smith, Ben and Thorp, Arabella (2011) p. 2

¹⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹⁴⁶ ICRC

¹⁴⁷ See note n 8 above p. 5

civilian, that doubt shall go in the persons favour as shown *in fine* with Art.50(1). Rebel forces therefore fall outside this definition and do not enjoy protection under the mandate.

4.2.4 Geographical limitations?

Shifting the focus to the protection element and specifically the alternative condition of "civilian populated areas", the mandate seems to set geographical limitations.¹⁴⁸ This means that not only can collation forces protect civilians themselves, they may also protect the areas in which they reside.

One clearly has the right to protect a populated area consisting solely of civilians, but what if this area is populated by a mix of both armed forces and civilians, does this change anything? The wording itself has no limitations towards this question and read in the light of its object and purpose, areas consisting of both armed forces and civilians are also within the mandate. The only condition needed to be met is the area itself must to some degree be populated by civilians.

A second scenario rises if the armed forces of a civilian populated area are the only ones being targeted by attacks. Does this impact the areas level of protection? The question must again be answered within the same frame as the previous one. This scenario does not limit the mandate and shows one may protect cities where rebel forces are present and even cities held by rebels, provided that civilians also populate the area.¹⁴⁹

However, this does not allow for the protection of the whole population or all geographical regions, only those where the civilian element is present. An interesting aspect of the authorization regards the expressed mentioning of the protection of Benghazi. This city is a civilian populated area and its mentioning immediately seems excessive, though it could be

¹⁴⁸ See note n 8 above p. 5

¹⁴⁹ l.c

evidence of its importance and viewed as a direct warning towards Al-Gaddafi forces pursuant of their announced attack.¹⁵⁰

4.2.5 What is a "threat of attack"?

A precondition must be met before the collation forces can protect civilians or the areas in which they reside. They must be under "threat of attack." The threat part shows an attack needs not to be on-going, only the "threat" of such need be evident. Bearing in mind the uniqueness that SCR's represent, the previous and similar discussed condition of "threat to the peace" cannot be applied without further discussion. Interpreted in its ordinary meaning, a "threat" means an intention to create hostilities. Resolution 1973 read as a whole shows the intention of the SC was to hinder hostilities towards the civilian population, and this also correlates with its ordinary meaning.

But not any hostility is covered by a "threat of attack." The word attack is not defined within the mandate nor the Charter. Its ordinary meaning comprises of aggressive action, usually accompanied by weapons or armed force towards someone or something, so what level of force is needed to meet the "attack" condition stated here?

The individual and collective right to self-defence within the Charter contains a similar precondition of "armed attack."¹⁵¹ Interpreted as a single word, an "attack" is arguably made up of a lesser level of harm by it dropping the "armed" part. This approach however has its difficulties as its target area diverges from the situation in Libya, its transfer value is therefore limited. Reading "attack" with the intent of the SC in mind, a strong argument can be made in favour of interpreting it as the use of military force against civilians.¹⁵² The unlawful killings of civilians by the Libyan government and the SC condemning these ac-

¹⁵⁰ I.c.

¹⁵¹ UN Charter Art. 51

¹⁵² See n 8 above 6

tions strengthen this argument. But determining when a "threat" exists must be based on "reasonable grounds."¹⁵³ What reasonable grounds are gives warrants further discussions and questions, one of which will be pursued in the next sub chapter.

4.2.5.1 Do military command centres represent a "threat"?

These installations traditionally serve as nerve centres behind military operations but whether they themselves possess a threat of attack towards civilians is another question. A difference between those military assets causing actual damage and command centres is only the mentioned "actual damage." But the command centre still takes a dominating role in the chain of causation. One could therefore argue that having this leading role makes them legitimate targets as removing them would possibly cripple the Libyan military forces, or at least obstruct them from threatening the civilian objectives in the mandate.

Against this an argument could be made that command centres being part of a military operations can never themselves possess "a threat of attack" in its ordinary meaning. Even though they are usually found in the very beginning of the chain of causation, they only give orders, not act on them. Placing these arguments head to head, the stronger side based on the SC's intention is to view command centres as part of a bigger military operation. By wounding this part of the operation, civilian lives could possibly be saved and this must be given decisive weight.

4.2.6 Can ground forces be used?

Foreign occupation occurs when a state exercises "effective control" over the territory of another state without its consent.¹⁵⁴ Focusing on the exclusion one could ask if ground forces deployed with the aim of protecting civilians from attacks fall within the term: "for-

¹⁵³ l.c

¹⁵⁴ Benvenisti (2009) para. 1

eign occupation force." Principally these groups have different aims and can therefore co-exist without the threat of illegality. But if armed forces stay beyond their specific mission(s), one quickly moves closer to the limitations of the authorization. This assessment must be done towards all ground forces post mission completion.

4.2.7 Can arms be sent to the rebels?

This is an interesting question when viewed under the current arms embargo imposed by resolution 1970 and continued with resolution 1973. The latter allows for all necessary measures used "notwithstanding paragraph 9 of resolution 1970 (2011)" which is the arms embargo.

The arms embargo forbids the "sale" or "transfer" of arms and related material from states to Libya but with three exceptions:

- a) Non-lethal items may be supplied solely for "humanitarian" or "protective use".
- b) Protective clothing taken to Libya by UN personnel, media representatives and humanitarian workers.
- c) Approved sales or supplies of arms by the Committee.

This arms-embargo shows that supplying lethal weapons would be illegal as the exception only concerns "non-lethal items." This makes for a discussion towards the legality of supplying "non-lethal items."

First one must define what "non-lethal items" are. The word "item" being broader than weapon, but the most relevant part of "item" in this discussion is weapons. Non-lethal weapons differ from ordinary weapons due to the fact that their main goal is not to take lives, but rather minimize the risk of causality without the item losing efficiency. Some non-lethal items are for protection only while others have attacking capabilities. Tear gas, electroshock weapons and guns shooting rubber bullets are typical non-lethal weapons.

One could argue that supplying rebel forces can never be defined as something "solely humanitarian" as these are middle men with their own agenda. The main opposing argument being that supplying rebels with such items would provide a more effective tool for the protection of civilians and civilian populated areas.

The alternative condition of "protective use" might give grounds for a wider interpretation but when read in context, it does not contain a strong argument towards such a widening approach. Paragraph 9 which imposes the arms embargo has a goal of stopping the flow of military items to Libya, and thereof loss of lives caused by them. Exceptions e.g. regard humanitarian and technical assistance. When protective use is placed between these examples it is difficult to assign it any meaning outside the humanitarian context. When these are the arguments, the position seemingly lying closest to both the intent of the SC and context is the one regarding supplying such arms as illegal actions, but this is a debatable conclusion.

4.2.8 Targeting Colonel Mu'hammar al-Gaddafi personally?

Coalition forces can only have one intention in mind when executing their mandate. This is as mentioned the protection of the civilian element. If targeting al-Gaddafi is viewed as a new objective, one could dismiss it immediately as being unlawful. But one could also use the same arguments as with the military command centres and say that al-Gaddafi is part of a bigger military scheme as the person primarily responsible for the threats against civilians. This is clear when he is regarded commander of Libya's armed forces. And removing him from the equation could mean reducing the threat level against civilians equally.

One cannot dismiss the fact that one of his sons could resume command if he would die and that this would strongly diminish the overall effects of losing him. Though the symbolic value of removing al-Gaddafi as head of state is arguably strong, this aim in itself does not constitute a legitimate aim within the mandate as he must pose a reasonable threat to civilians. U.S Secretary of Defence Robert M. Gates has been quoted saying:

"Well, I think that it's important that we operate within the mandate of the U.N. Security Council resolution. This is a very diverse coalition and the one thing that there is common agreement on are the terms set forth in the Security Council resolution. If we start adding additional objectives, then I think we create a problem in that respect. I also think that it is unwise to set as specific goals, things that you may or may not be able to achieve. "¹⁵⁵

By saying it could "create a problem" when adding "additional objectives" shows an argument in favour of regarding al-Gaddafi as not being a legitimate target, but these words do not expressly rule out the possibility either as they are lacking in precision.

The British Secretary of State for Defence has said that targeting al-Gaddafi "would potentially be a possibility."¹⁵⁶ His position is much stronger compared to the U.S stance in recognizing this option. A split opinion within the British government must also be noted between Prime Minister David Cameron in favour, whilst the chief of the defence staff, Sir David Richards has opposed such a notion, thus making clarification essential.¹⁵⁷

An article published on 14 April 2011 by Barack Obama, David Cameron and Nicolas Sarkozy gave even more doubt to the question by first saying the aim of the mandate "is not to remove Qaddafi by force" but that it is "impossible to imagine a future for Libya with Qaddafi in power."¹⁵⁸ These arguments go in completely different directions. What might be extracted from this article is that legalistically the mandate limits such actions, but realistically the coalition forces view such measures as necessary to secure future peace in Libya.

The above mentioned arguments show there is no clear answer available as even the leaders of the coalition forces cast doubt on the question. As a single person it is difficult to

¹⁵⁵ Secretary Gates enroute to Russia, from Andrews Air Force Base, News Transcript (2011)

¹⁵⁶ In a Radio Five Live interview, quoted in Kirkup (2011)

¹⁵⁷ Wintour and MacAskill, The Guardian, March 22, 2011

¹⁵⁸ Obama, Cameron and Sarkozy, The New York Times, April 14, 2011.

argue that al-Gaddafi is a legitimate target within the mandate. The symbolic value of removing him seems far greater than the level of threat he himself poses towards the civilian population.

But if one were to view al-Gaddafi as a reasonable threat, one must also consider the level of threat he poses at the time of an eventual attack since this level might increase or decrease as the conflict develops. After all, there is a difference between a man fleeing the country and a man still in charge of armed forces.

Just being in charge is different from the likes of military command centres as these seem far more important in the chain of causation towards attacking civilians. These centres plan and give order continually which is different from al-Gaddafi, assumed he is giving direct orders, as he is unlikely to operate to the same extent and scale as these facilities do. This assumption gives grounds to regard targeting Colonel Mu'hammar al-Gaddafi personally as unlawful and the conclusion to this ambiguous question.

4.3 General principles of international humanitarian law

The powers to use "all necessary measures" must also be applied within the rules of IHL to be lawful. Applicable law includes The Geneva Conventions of 1949 and Additional Protocol 1 for Libya and most participating NATO states. The United States though not formally part of Additional Protocol 1 are still bound by it, as it is regarded as international customary law.¹⁵⁹ Article 48 of Additional Protocol 1 states the basic rule:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

¹⁵⁹ Matheson. (1987) pp. 419-427

Distinguishing between civilians and combatants must therefore be done at all times for military actions to be lawful. Failing to do so will amount to regarding such acts as indiscriminate and illegal as stated in Art. 51(4).

Article 51(2) and 52(2) further specifies that civilians "shall not" be the object of "attack" and that attacks shall be "limited strictly" to "military objectives." This shows that civilian casualties do not necessarily amount to unlawful acts. Only the specific targeting of civilians is unlawful. In this context "attacks" are defined in Art. 49(1) as "acts of violence against the adversary, whether in offence or in defence." While article 52(2) defines "military objectives" as objects giving "effective contribution to military action" and where its destruction offers a "definite military advantage."

By adding a "definite military advantage" to the definition, one cannot attack all military objects arguing there is some kind of military advantage to be gained, there must be "concrete and perceptible military advantage."¹⁶⁰ There must also be a "definite" proven advantage. Attacks based on a "likely" or "probable" advantages falling outside this scope.

Article 51(5)(a) and (b) expands the notion of indiscriminate attacks by first adding that bombing military objectives with a similar concentration of civilians or civilian objects is forbidden. And secondly, that one must always view the concrete and direct anticipated "military advantage" as loss of civilian lives could be excessive compared to this gain, making disproportionate measures fall within the definition of indiscriminate attacks and thus unlawful.

¹⁶⁰ Solis (2010) p. 522

A general rule of precaution is also in force through Art. 57. This rule compels the parties to take a high level of care to minimize incidental loss of civilian lives. These measures include "all feasible precautions in the choice of means and methods of attack" as stated in 57(2)(ii).

4.4 Applying the limits of the mandate and the rules of IHL

An extensive interpenetration of the mandate as well as an outline of some of the basic principles of IHL has now been done. This next part has a narrower focus as it will concern itself solely with those acts lying closest to the limits of legality. The goal is not to focus on all possible violations, but those most doubtful and carrying the widest repercussions. Actions clearly falling within the mandate and IHL will not be addressed.

4.4.1 Aiding rebel forces to facilitate regime change?

Aiding rebels under IHL is not in principle an unlawful act, but the specific measures chosen to support this aim might be. If NATO e.g. were to target military objects without a "definite military advantage" to try and help rebel forces, this would be in breach of IHL.

The mandate is limited towards those measures needed in achieving protection of "civilians and civilian populated areas" under "threat of attack". Its aim was not to authorize a regime change in Libya, this is a crucial distinction.¹⁶¹ If NATO were to help and assist rebel forces facilitate such a change without civilians being under a threat of attack, it would not be a legitimate aim within resolution 1973 and considered unlawful.

On the other hand, one could argue that only by facilitating a regime change would civilians be protected in the long run. This however does not change the fact that the mandate only allows for help when civilians are under "threat of attack". The BRICS nations have

¹⁶¹ See note 8 above 11

repeatedly accused NATO of using the resolution as a cover to facilitate a regime change by aiding rebel forces.¹⁶²

As a rare response the Secretary General of the UN, Ban Ki-moon has publicly stated that: "This military operation done by the NATO forces was strictly within (resolution) 1973."¹⁶³ NATO members like The United States and Great Britain have also supported Ban Ki-moon's statement but this is only natural when being accused of unlawful acts. These divided opinions show a conflict between those states executing the resolution on the one side, and those observing on the other.

NATO did not only use airstrikes to wipe out command and control centres in Libya. When rebels reached territories held by Al-Gaddafi forces, NATO would launch air strikes in the same areas, effectively helping the rebels conquer new territories.¹⁶⁴ This on-going support consequently led to the rebels overthrowing the regime. But NATO has denied these accusations saying they have stuck to the mandate to protect civilian lives.¹⁶⁵

An argument could be made towards the airstrikes possibly being based on consent.¹⁶⁶ However, this will only have relevance if the rebel forces had obtained and effectively controlled enough territory to be regarded as the new Libyan government. This condition is unlikely to have been met at the time the airstrikes were happening, since the aim was then to secure hostile territories so one could get territorial control.

¹⁶² Charbonneau, Reuters Africa, 15 December 2011.

¹⁶³ *I.c*

¹⁶⁴ See note 8 above 12

¹⁶⁵ Aljazeera, 8 July 2011.

¹⁶⁶ See note 8 above 12

But even if NATO itself has denied such accusations, the French have confirmed dropping weapons to rebel forces in Western Libya.¹⁶⁷ Not forgetting arms dropped by Qatar, even though they are not a NATO member.¹⁶⁸ Such actions are considered to be outside the mandate as previously discussed under chapter 4.2.7. Russia also viewed the supplies of arms to rebels as unlawful when Foreign Minister Sergei Lavrov said: "If this is confirmed, it is a very crude violation of UN Security Council resolution 1970".¹⁶⁹

A secret mission by the intervening states was also reported of being held separate from NATO's military command to ensure it did not compromise its mandate. Undercover helpers stationed within Libya would send intelligence back to NATO and train rebel forces.¹⁷⁰ A formal acknowledgement of these "advisors" was done by French Foreign Minister Alain Juppe when he told a radio station that France had contributed "a few instructors" to train rebel fighters.¹⁷¹

A diplomat given anonymity by the NY Times was quoted on saying:

“the learning curve for the rebels, with training and equipping, was increasing”¹⁷²

These sources together show the coalition forces have in fact supplied, trained and coordinated attacks with rebel forces against the regime. These actions are outside of the mandate because the territories which they were advancing upon were not under "threat of attack" by their keepers but by the rebel forces themselves, meaning the rebels in a turn of events actually posed the "threat of attack" towards civilians and not Gaddafi forces.¹⁷³

¹⁶⁷ BBC News, 29 June 2011.

¹⁶⁸ *l.c.*

¹⁶⁹ BBC News, 30 June 2011.

¹⁷⁰ Baldor, 23 August 2011.

¹⁷¹ *l.c.*

¹⁷² The New York Times, 21 August 2011.

¹⁷³ Akande, EJILTalk 31 March 2011.

One could further argue the coalition forces choose sides by assisting rebels, a position not available by the neutral wording of the mandate. But on the other side, some have argued the resolution "hints" to taking sides by mentioning Benghazi specifically as this civilian populated city was under threat of attack.¹⁷⁴ This however is not a very strong point when considering the eminent danger this city was put under by Al-Gaddafi forces prior to resolution 1973.

An answer confirming that NATO was aiding rebel forces to facilitate a regime change must therefore be given and consequently a breach of the mandate did happen. A branch of this question leads to the legality of targeting specific commanders of the regime, most prominent al-Gaddafi himself.

4.4.2 The targeting of Colonel Mu'hammar al-Gaddafi

Under IHL, Colonel Mu'hammar al-Gaddafi is clearly a lawful target as commander of Libya's armed forces. The question of legality will therefore only concern the mandate.

The conclusion under chapter 4.2.8 was that targeting al-Gaddafi personally was an unlawful act under the mandate. NATO officials have later in the conflict viewed the resolution differently as allowing for such an attack and confirmed this.¹⁷⁵ But viewing and acting are two different things and here the question of legality is solely towards the act itself. A source in favour of saying NATO acted outside the mandate came when a top U.S. admiral admitted that NATO was trying to kill al-Gaddafi.¹⁷⁶ But no official statements concerning

¹⁷⁴ See note 145 above 4

¹⁷⁵ Townsend, CNN National Security Contributor, June 10, 2011

¹⁷⁶ House Armed Services Committee member Mike Turner (R-OH) told The Cable that U.S. Admiral Samuel Locklear told him last month that NATO forces are actively targeting and trying to kill Qaddafi. June 24, 2011.

the targeting of al-Gaddafi has ever been given by NATO. Quite the contrary as Lieutenant-General Charles Bouchard, commander of NATO's Operation Unified Protector, said:

"All Nato's targets are military in nature and have been clearly linked to the Gaddafi regime's systematic attacks on the Libyan population and populated areas. We do not target individuals."¹⁷⁷

There are reports claiming that missiles were fired into an al-Gaddafi compound only hours after he appeared on state television.¹⁷⁸ A compound located just over a mile from the hotel in which the appearance was recorded.¹⁷⁹ Assuming this is correct, there is a strong argument in favour of seeing the attack in connection with the television appearance and regarding this as a targeted attack.

NATO Secretary General Anders Fogh Rasmussen opposed this argument saying "we do not target individuals, we target military capabilities that can be used to attack civilians,"¹⁸⁰ This therefore ends up as a question of which side one wants to believe. Not only have sources reported that NATO specifically targeted al-Gaddafi, a confirmation from Britain's Defence Minister Liam Fox towards coalition forces aiding rebel forces target al-Gaddafi was given when he stated:

"I can confirm that NATO is providing intelligence and reconnaissance assets to the NTC (National Transitional Council) to help them track down Colonel Gaddafi and other remnants of the regime,"¹⁸¹

One could here argue that participation should not be viewed any different from the direct acts themselves, as this would be a too convenient way of going around the limits of the mandate. And also, complicity is treated the same way as the principal act in most parts of the world.

¹⁷⁷ Traynor, The Guardian. 1 May, 2011

¹⁷⁸ Birnbaum and DeYoung, The Washington Post. May 12, 2011

¹⁷⁹ *l.c*

¹⁸⁰ *l.c*

¹⁸¹ Reuters Aug 25, 2011.

In conclusion, this factual question is a matter of credibility. While NATO has confirmed aiding rebels to track down al-Gaddafi which could be regarded unlawful, they have never expressed that they themselves have targeted him. But why would NATO confirm they view the mandate as allowing for the targeting of al-Gaddafi, and then deny acting upon it if they in fact did. This could be linked to the dubious nature of the legality of targeting Gaddafi. Or simply because the source that confirmed NATO's view was mistaken or wrong, considering this statement never came through official channels.¹⁸² Its credibility is therefore lacking. But the amount of sources in favour of NATO targeting Gaddafi is arguably stronger than their on-going denial. Objectively the most probable course of events seems to be that NATO were targeting Gaddafi, which is unlawful under the present interpretation of the authorization.

4.4.3 Indiscriminate or disproportionate use of force?

The mandate gives the power to use "all necessary measures" to achieve its objectives. This is therefore a question solely concerning the legality of IHL. A report published by Human Rights Watch examined eight NATO air strikes(incidents) in Libya that resulted in 72 civilian deaths, including 20 women and 24 children.¹⁸³ Four of these incidents leading to the deaths of 49 people will be the basis for answering this question and applied under the principles of IHL.

August 8, 2011, 34 deaths.

Four houses in Majer were hit by NATO air strikes this day, a place described as a "rural village" about 10 kilometres south of the town of Zliten. Human Rights Watch found no evidence of military activity at either of the compounds except one military-style shirt. They also found fins from a GBU-12 laser guided bomb at the site which proves the pilot

¹⁸² See note 178 above.

¹⁸³ Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya*, 14 May, 2012.

had the ability to guide the bomb, and that these houses most probably were the intended targets. NATO told HRW that these compounds were “legitimate military targets.”¹⁸⁴ This was based on:

“clear intelligence that the former farm buildings were being used as a staging point for pro-Qadhafi forces to conduct attacks against the people of Libya and the likelihood of civilians in the nearby vicinity was low.”¹⁸⁵

However, as HRW point out, this statement has not yet been backed up by evidence. Bearing in mind that NATO is the party closest to provide evidence legitimizing their actions, their lacking will to put forth such proof may be based on its non-existents. But the lacking will does not necessarily mean that these houses were not legitimate military targets either, though it undoubtedly fuels such a thought.

The high number of civilian deaths makes one question if these bombs were proportionate to achieve their concrete and direct anticipated "military advantage." Without knowing what this advantage was, one cannot answer this question satisfactory. Assuming these compounds were staging points for troops, removing them and consequently killing this many civilians seems excessive compared to the advantage gained. Especially viewed from a civilian stand point since one did not know how many troops were stationed there, nor their readiness to attack. Unfortunately, no final conclusion can be made without further evidence.

August 4, 2011. Three Deaths.

A NATO bomb hit the house of Mustafa al-Morabit, a teacher in the town of Zlitan around 6 a.m. This led to the collapse of the room where the woman and children of the family were sleeping, causing the deaths of his wife and two children. HRW reported the house next door had housed al-Gaddafi forces until two days before the attack, but that no evi-

¹⁸⁴ *ibid.* p. 31

¹⁸⁵ *ibid.* p. 30

dence were found that Mustafa al-Morabit's house was used for a similar purpose. HRW said that such evidence could have "potentially" been moved.¹⁸⁶

As a response to these allegations, NATO told HRW that “the target building and buildings immediately adjacent to it were used exclusively by senior regime commanders as an active command and control facility directing forces in the Zliten area.” They therefore concluded that their actions were lawful.

This brings up the question of "necessary precaution" towards verifying that the attacked house of Mustafa al-Morabit contained neither civilians nor civilian objects, but legitimate military objects as Art 57(2)(i) prescribes. HRW said "satellite imagery taken before the strike on August 3, shows no signs of military activity at or around the house." NATO has not provided evidence showing that they have met the level of precaution needed to be in conformity with IHL. The unwillingness to provide clarification is apparent and once again fuels a thought of unlawful behaviour, but this cannot be confirmed. Assuming NATO has not taken any further steps to verify the target, this should be viewed as a breach of the principle.

June 19, 2011. Five deaths.

A residential area in Souk al-Juma was hit by a NATO air strike, which led to the deaths of five people. HRW visited the site and found no evidence of military activity and satellite imagery acquired on June 7 and 10 revealed no such signs either. NATO acknowledged their mistake but said they intended to hit a "military missile site" and blamed the miss on a systems malfunction due to "laser guidance problems".¹⁸⁷ NATO later said “it was possible that the errant weapon had caused such casualties”.¹⁸⁸

¹⁸⁶ *ibid.* p. 33

¹⁸⁷ *ibid.* p. 38

¹⁸⁸ *ibid.* p. 39

Art 51(2) states that civilians shall not be the "object of attack." Assuming NATO's claim is correct, no mens rea towards attacking civilians means the air strike was not in violation of this article because civilians were not the intended "object of attack." Since NATO has not stated the concrete military advantage anticipated by the strike, it is not possible to discuss the element of disproportionate measures found in Art. 57(2)(a)(iii). However, questioning if NATO had taken "all feasible precautions" in their "choice of means and methods of attack" may be asked if one assumes the missile site was located in close vicinity to the residential area. If this was the case, an argument in favour of choosing ground troops instead of an air strike could be made because of the high possibility of civilian casualties if the air strike would miss.

On the other hand, one could also argue a targeted air strike has a better level of succeeding without causing civilian lives compared to ground troops, as these strikes to some degree remove the human element of error. Technological advances in war fare also contribute to this argument as precision continuously gets better. In conclusion, it is doubtful if this strike was unlawful based on the assumptions above.

September 16, 2011, Two Deaths.

On this day a seven story apartment complex in Sirte called Imarat al-Tameen was struck by air strikes which led to the deaths of a pregnant nurse and a truck driver. Most of the families living there had already fled the apartment complex when the attacks started but some had stayed put.¹⁸⁹ There were allegedly snipers placed on the roof prior to the attack. When HRW inspected the roof top post attack they found a "dozen spent rifle cartridges and remnants of a JDAM (satellite guided bomb)".¹⁹⁰ In a passageway on the north side of the complex they also found a few discarded military uniforms. The rifle cartridges could have belonged to the alleged snipers but HRW could not determine if the cartridges were there prior to the NATO attack or not.

¹⁸⁹ *ibid.* p. 50

¹⁹⁰ *ibid.* p. 53

Snipers here would be legitimate military targets as they would be an "effective contribution to military action". But was the bombing of an apartment complex disproportionate to the gain of killing a few snipers? (the assumption based on a "dozen spent rifle cartridges" found).

As a military asset, snipers pose a huge threat to visible civilians standing within the range of a snipers weapon. Snipers were also used previously by al-Gaddafi to shoot protesters in Benghazi.¹⁹¹ But compared to an apartment complex potentially full of civilians, the value seems disproportionate as Art 51(5)(b) regards the "expected" loss at the time of attack to be the key concern, not the actual loss. An apartment could potentially contain a whole family, and by it being a "complex" multiplies this assumption to a risk not worth taking when the gain seemingly deals with the removal of a "few" snipers. Therefore this appears to be a disproportionate bombing.

4.5 Final conclusions to Chapter Four

The questions above have all led to further discussions and the conclusions are debatable. Some of which have largely been based on assumptions, a necessity due to the lacking will or existence of evidence supplied by NATO. Legality as mentioned depends on an act being within the overlapping circles of both the mandate and IHL. This has not been the case for all of NATO's acts, though it must be said that they rarely have been in breach of both rule sets. This conclusion regards the degree of unlawfulness, rather than a simple yes or no answer of legality in itself. The conclusion based on the previous discussions is therefore that NATO to some degree has acted outside its legal limits and these acts must be regarded as unlawful in international law.

¹⁹¹ The Telegraph, 20 February 2011.

5 Ending remarks

The two principal questions concerning the legality of the intervention in Libya has led to a wide range of interpretational discussions and concerns, though the most important humanitarian question stands yet unanswered. Resolutions 1970 and 1973 both aimed to protect the civilian population in Libya, but did the coalition forces succeed in meeting this aim?

In the aftermath of the conflict, widespread suspicion has led to suspected pro al-Gaddafi fighters and loyalists being tortured and killed.¹⁹² Amnesty has also reported that militia's now one year after roam Libya committing human rights abuses and war crimes.¹⁹³ This shows that Libyans yet again must fight for justice. And that the removal of one tyrant does not necessarily mean that peace naturally follows. This is a gradual process where taking one step at a time is the only way to move forward. It all boils down to the conflict in Libya having deeper roots to its cause than the surface indicated.

When viewing both the authorization and execution through the eyes of the law, a grave concern regards the possible damage caused by the sometimes "missing link" between them. A missing link which might shackle the Security Council's powers by future vetoes. If similar humanitarian disasters were to come on their radar, those states opposing an initial intervention would now have even more strength behind their arguments by pointing to Libya and the illegal expenditure of the mandate. This is apparent as many states have demanded an investigation into the legality of the actions by NATO.¹⁹⁴

Protecting ones civilians in times of war is both essential and necessary. A state's responsibility to act on this thought which led to the adoption of the R2P doctrine may also have suffered from the execution of resolution 1973. The authorization pointing to the R2P doc-

¹⁹² Amnesty, 26 January 2012.

¹⁹³ Amnesty, 15 February 2012.

¹⁹⁴ See note 8 above 13

trine and its departing execution may thus have given irreparable damage to this growing concept. How much damage it has suffered is yet to be discovered.

Cicero once aptly said: "Ut sementem feceris, ita metes." And as you sow, so shall you reap might be a notion that will follow future coalition forces wanting to intervene when humanitarian disasters develop, effectively hindering help to those most in need.

Bibliography

Treaties:

- Rome Statute of the International Criminal Court, 17 July 1998.
- Statute of the International Law Commission, 1947.
- The Geneva Conventions, Geneva, Switzerland, 12 August 1949 and Protocol Additional relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
- UN Charter, San Francisco 26 June 1945.
- Vienna Convention on the Law of Treaties, Vienna 23 May 1969.

UN Documents\Resolutions\Reports:

A/63/PV.97, 23 July 2009.

A/63/PV.98, 24 July 2009.

A/63/PV.99, 24 July 2009.

A/63/PV.100, 28 July 2009.

S/PV.3009, 25 September 1991.

Resolution 2166 (XXI) 26 March – 24 May 1968. First session.

A-RES-377(V), 03 November 1950.

A/RES/46/236, 22 May 1992.

A/RES/46/237, 22 May 1992.

A/RES/46/238, 22 May 1992.

A/60/L.1, 15 September 2005.

S/RES/688, 5 April 1991.

S/RES/713, 25 September 1991.

S/RES/733, 23 January 1992.

S/RES/794, 3 December 1992.

S/RES/814, 26 March 1993.

S/RES/827, 25 May 1993.

S/RES/836, 4 June 1993.

S/RES/841, 16 June 1993.

S/RES/918, 17 May 1994.
S/RES/929, 22 June 1994.
S/RES/1529, 29 February 2004.
S/RES/1542, 30 April 2004.
S/RES/1970, 26 February 2011.
S/RES/1973, 17 March 2011.
S/23693, 11 March 1992.

Advisory opinions:

ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion) 22 July 2010.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

Cases:

Case of Al-Jedda v. The United Kingdom. The European Court of Human Rights, Strasbourg, 07. July 2011.

Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995.

Statements:

E. C. Luck, Special Adviser to the Secretary-General, "Remarks to the General Assembly on the Responsibility to Protect", New York, 23 July 2009.

OIC General Secretariat. *Condemns Strongly the Excessive Use of Force against Civilians in the Libyan Jamahiriya*. http://www.oic-oci.org/topic_detail.asp?t_id=4947&x_key=libya
[Cited 06. September 2012]

Peace and Security Council 261st Meeting, Addis Ababa, Ethiopia, 23 February 2011.

Books:

Brownlie, Ian. *International Law and the Use of Force by States*. Clarendon Press, 1963.

Chesterman, Simon. *Just WAR or Just PEACE? Humanitarian Intervention and International Law*. Oxford University Press, 2001.

Conforti, Benedetto and Carlos Focarelli. *The Law and Practice of The United Nations*. 4th revised edition. Martinus Nijhoff Publishers, 2010.

Dansk Udenrigspolitisk Institut. *Humanitarian Intervention: Legal and Political Aspects*. Danish Institute of International Affairs, 1999.

Hehir, Aidan. *Humanitarian Intervention: An Introduction*. Palgrave Macmillan, 2010.

Human Rights, Intervention, and the Use of Force. Edited by Philip Alston and Euan MacDonald. Oxford University Press, 2008.

Humanitarian Intervention and International Relations. Edited by Jennifer M. Welsh. Oxford University Press, 2004.

Just intervention. Edited by Anthony F. Lang. Georgetown University Press, 2003.

Kelsen, Hans. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problem*. Issue 11 of Library of World Affairs. The Lawbook Exchange, Ltd, 1950.

Lailach, Martin. *Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen*. Duncker & Humblot, 1998.

Law and civil war in the modern world. Edited by John Norton Moore. Johns Hopkins Press, 1974.

Lepard, Brian D. *Rethinking Humanitarian Intervention: a fresh legal approach based on fundamental ethical principles in international law and world religions*. The Pennsylvania State University Press, 2002.

Linderfalk, Ulf. *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*. Springer, 2007.

MacQueen, Norrie. *Humanitarian Intervention and the United Nations*. Edinburgh University Press, 2011.

Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. 7th Revised Edition. Routledge, 1997.

Manusama, Kenneth. *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*. Martinus Nijhoff Publishers, 2006.

Österdahl, Inger. *Threat to the peace. The interpretation by Security Council of article 39 of the UN Charter*. Issue 13 of Studies in international law, Swedish Institute of International Law. Justus, 1998.

Rosenne, Shabtai. *Developments in the Law of Treaties 1945-1986*. Cambridge University Press, 1989.

Schelling, Thomas. *The Global Dimension*. In: Rethinking america's security. Edited by Graham Allison & Gregory F. W.W. Norton, New York (1992) pp. 196-210.

Schrijver, N.J. 'Sovereignty Versus Human Rights? A Tale of UN Security Council Resolution 688 (1991) on the Protection of the Kurdish People'. In: Castermans, Van Hoof, Smith (eds.), *The role of the Nation-State in the 21st Century* (1998), pp. 347-357.

Schweigman, David. *The Authority of the Security Council under Chapter VII of the UN Charter. Legal limits and the Role of the International Court of Justice*. Kluwer Law International, 2001.

Securing Human Rights: Achievements and Challenges of the UN Security Council. Edited by Bardo Fassbender. Oxford University Press, 2011.

Shaw, M.N. *International Law*. 3rd ed. Cambridge University Press, 1995.

Shorter Oxford English Dictionary volume 2, 6th Edition. Oxford University Press, 2007.

Sinclair, Ian. *The Vienna Convention on the Law of Treaties*. 2th Edition. Manchester University Press ND, 1984.

Solis, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge University Press, 2010.

Tesón, Fernando. *Humanitarian Intervention: An Inquiry Into Law And Morality*. 2nd Edition. Transnational Publishers Inc, 1988.

The Charter of the United Nations: A Commentary. Edited by Bruno Simma. Oxford University Press, 1994.

The Charter of the United Nations: A Commentary. Edited by Bruno Simma. Volume I, 2th Edition. Oxford University Press, 2002.

The Law of Nations: An Introduction to the International Law of Peace. Edited by Humphrey Waldock. 6th Edition. Oxford University Press, 1978.

The Responsibility to Protect and International Law. Edited by Alex J. Bellamy, Sara E. Davies and Luke Glanville. Martinus Nijhoff Publishers, 2011.

Law journals:

Alvarez, Jose E. *Judging the Security Council*. In: The American Journal of International Law, Vol. 90, No. 1 (Jan., 1996), pp. 1-39.

Benvenisti, Eyal. Occupation, Belligerent . In: Max Planck Encyclopaedia of Public International Law, May 2009.

Glennon, Michael J. *Sovereignty and Community after Haiti: Rethinking the Collective Use of Force*. In: The American Journal of International Law, Vol 89, No. 1 (Jan., 1995), pp. 70-74.

Kahgan, Carin. *Jus Cogens and the Inherent Right to Self-Defence*. In: 3 ILSA J. Int'l & Comp. L. (1996-1997), pp. 767-828.

Larsen, Kjetil Mujezinovic. *Tolking av sikkerhetsrådsresolusjoner - en kommentar til Sverre Lodgaard*. In: *Lov og rett*. ISSN 0024-6980. (2012) pp. 363-369.

Matheson, Michael J. *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, reprinted in "The Sixth Annual American Red-Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy*, vol. 2, no. 2 (Fall 1987) pp 419-427.

O'Connell, Mary Ellen. *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*. In: 36 *COL. J. TRANS. L.* (1997), pp. 473-492.

Oosthuizen, Gabriël H. *Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law*. In: *Journal of International Law*. Nr. 12 (1999), pp. 549-563.

Orakhelashvili, Alexander. *The Power of the UN Security Council to Determine the Existence of a "Threat to the Peace"*. In: *Irish Yearbook of International Law*, Volume 1 (2006) pp. 61-100.

Peters, Anne. *The Security Council's Responsibility to Protect*. In: *International Organizations Law Review* 8 (2011) pp. 1-40.

Reisman, Michael W. *Hollow Victory: Humanitarian Intervention and Protection of Minorities*. In: *Yale Law Faculty Scholarship Series*. Paper 969 (1997), pp. 431-435.

Roberts, Adam. *Humanitarian War: Military Intervention and Human Rights*. In: *International Affairs* (Royal Institute of International Affairs 1944-) , Vol. 69, No. 3 (Jul., 1993), pp. 429-449.

Schwindt, Jean C. *Interpreting the United Nations Charter: From Treaty to World Constitution*. In: *U.C. Davis J. Int'l L. & Pol'y* (2000), pp. 193-214.

Skubiszewski, Krzysztof. *Peace and War*. In: 4 EPIL (1982) pp. 74-78.

Smith, Ben and Thorp, Arabella. *Interpretation of Security Council Resolution 1973 on Libya*. In: UK House of Commons Library Research Papers, SN/IA/5916. pp. 1-10.

Thirlway, Hugh. *The Law and Procedure of the International Court of Justice 1960-1989*. In: British Yearbook of International Law (1996) 67 (1), pp. 1-73.

Ulfstein, Geir and Christiansen, Hege E. *The Legality of the NATO bombings in Libya*. In: International and Comparative Law Quarterly. Forthcoming.

Watson, Geoffrey R. *The Death of Treaty*. In: 55 Ohio St. L.J. (1994), p. 781.

Wood, Michael C. *The interpretation of Security Council Resolutions*. In: 2 Max Planck Yearbook of United Nations Law (1998), pp. 73-95.

Online articles:

Akande, Dapo. EJIL:Talk. *Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?* March 31, 2011. <http://www.ejiltalk.org/2011/03/> [Cited 1. November 2012]

Al Jazeera. *Arab states seek Libya no-fly zone*. March 12, 2011. <http://www.aljazeera.com/news/africa/2011/03/201131218852687848.html> [Cited 06. September 2012]

Al Jazeera. *NATO denies aiding Libyan rebel advance*. July 8, 2011. <http://www.aljazeera.com/news/africa/2011/07/20117861330649170.html> [Cited 1. November 2012]

Amnesty International. *The Battle for Libya, Killings, Disappearances and Torture*. London 2011. <http://www.amnesty.org/en/library/asset/MDE19/025/2011/en/8f2e1c49-8f43-46d3-917d-383c17d36377/mde190252011en.pdf> [Cited 05. September 2012]

Amnesty. *Libya: Deaths of detainees amid widespread torture*. January 26, 2012. <http://www.amnesty.org/en/news/libya-deaths-detainees-amid-widespread-torture-2012-01-26> [Cited 3. November 2012]

Amnesty. *Libya: 'Out of control' militias commit widespread abuses, a year on from uprising*. February 15, 2012. <http://www.amnesty.org/en/news/libya-out-control-militias-commit-widespread-abuses-year-uprising-2012-02-15> [Cited 4. November 2012]

Baldor, Lolita C. *US, NATO were crucial, unseen hands in Libya fight*. August 23, 2011. <http://news.yahoo.com/us-nato-were-crucial-unseen-hands-libya-fight-213917337.html> [Cited 31. October 2012]

BBC News. *Libya conflict: France air-dropped arms to rebels*. June 29, 2011. <http://www.bbc.co.uk/news/world-africa-13955751> [Cited 31. October 2012]

BBC News. *Libya: Russia decries French arms drop to Libya rebels*. June 30, 2011. <http://www.bbc.co.uk/news/world-europe-13979632> [Cited 31. October 2012]

Charbonneau, Louis. Reuters Africa. *UN chief defends NATO from critics of Libya war*. December 15, 2011. <http://af.reuters.com/article/topNews/idAFJOE7BE01620111215> [Cited 2. November 2012]

Eric Schmitt and Steven Lee Myers, The New York Times. *Surveillance and Coordination With NATO Aided Rebels*. August 21, 2011. <http://www.nytimes.com/2011/08/22/world/africa/22nato.html> [Cited 1. November 2012]

Garamone, Jim. American Forces Press Service. *Coalition Launches 'Operation Odyssey Dawn'*. March 19, 2011.

<http://www.defense.gov/news/newsarticle.aspx?id=63225> [Cited 24. October 2012]

Human Rights Watch. *Haiti: Recycled Soldiers and Paramilitaries on the March*. 2004. http://www.hrw.org/legacy/english/docs/2004/02/27/haiti7677_txt.htm [Cited 25. September 2012]

Human Rights Watch. *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya*. <http://www.hrw.org/reports/2012/05/13/unacknowledged-deaths> [Cited 05. October 2012]

ICRC. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> [Cited 18. October 2012]

Kirkup, James. *Target Gaddafi? Britain says 'Maybe'. The US says 'No'*. March 21, 2011. <http://blogs.telegraph.co.uk/news/jameskirkup/100080619/target-gaddafi-britain-says-maybe-the-us-says-no/> [Cited 25. October 2012]

Media Availability with Secretary Gates enroute to Russia, from Andrews Air Force Base, March 20, 2011. <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4788> [Cited 25. October 2012]

Meo, Nick. The Telegraph. *Libya protests: 140 'massacred' as Gaddafi sends in snipers to crush dissent*. February 20, 2011. <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8335934/Libya-protests-140-massacred-as-Gaddafi-sends-in-snipers-to-crush-dissent.html> [Cited 7. November 2012]

Michael Birnbaum and Karen DeYoung, The Washington Post. *NATO missiles hit Gaddafi's complex*. May 12, 2011. http://www.washingtonpost.com/world/nato-missiles-hit-gaddafis-complex/2011/05/12/AFlpvgyG_story.html [Cited 4. November 2012]

Nato and Libya. http://www.nato.int/cps/en/natolive/topics_71652.htm [Cited 24. October 2012]

Obama, Cameron and Sarkozy, The New York Times. *Libya's Pathway to Peace*. April 14, 2011. http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html?_r=0 [Cited 3. November 2012]

Reuters. *NATO helping rebels hunt Gaddafi: UK*. August 25, 2011. <http://www.reuters.com/article/2011/08/25/us-libya-gaddafi-nato-idUSTRE77O1SX20110825> [Cited 1. November 2012]

Rogin, Josh. The Cable: Foreign Policy. *Exclusive: Top U.S. admiral admits we are trying to kill Qaddafi*. June 24, 2011. http://thecable.foreignpolicy.com/posts/2011/06/24/exclusive_top_us_admiral_admits_we_are_trying_to_kill_qaddafi [Cited 2. November 2012]

Townsend, Fran. CNN. *NATO official: Gadhafi a legitimate target*. June 10, 2011. <http://edition.cnn.com/2011/WORLD/africa/06/09/libya.gadhafi/index.html> [Cited 2. November 2012]

Traynor, Ian, The Guardian. *Nato denies targeting Muammar Gaddafi*. May 1, 2011. <http://www.guardian.co.uk/world/2011/may/01/libya-nato-gaddafi-un-resolution> [Cited 4. November 2012]

Wintour, Patrick and MacAskil, Ewen, The Guardian. *Is Muammar Gaddafi a target? PM and military split over war aims*. March 22, 2011.

<http://www.guardian.co.uk/world/2011/mar/21/muammar-gaddafi-david-cameron-libya?INTCMP=SRCH> [Cited 25. October 2012]